IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1977

No. _____

77-148

ROGER A. BRITT, et al.,

Petitioners,

vs.

SAN DIEGO UNIFIED PORT DISTRICT, and SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF SAN DIEGO,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE

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PETITION FOR WRIT OF CERTIORARI
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Petitioners Roger A. Britt, et al., (hereafter Homeowners) respectfully pray that a writ of certiorari issue to review the decision of the California Court of Appeal, Fourth Appellate District, Division One, in the case at bench and, upon such review, a decision issue which makes it clear that "federal pre-emption" of airspace management does not bar state court suits for damages by neighbors of airports against airport operators.

Opinion Below

The opinion of the California Court of Appeal presented for review by this petition is reported as San Diego Unified Port Dist. v. Superior Court (1977) 67 Cal.App.3d 361, 136 Cal.Rptr. 557. A copy of the opinion is attached hereto as an Appendix.

Jurisdiction

The judgment of the California Court of Appeal sought to be reviewed was filed and entered on February 18, 1977. A timely Petition for Rehearing was denied by that Court on March 15, 1977. A timely Petition for Hearing in the California Supreme Court was denied (after the Court extended its time to consider the Petition) on April 28, 1977.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3).

Questions Presented for Review

1. Assuming arguendo that Congress intended to preempt local regulation of commercial aviation, does the "saving clause" contained in 49 U.S.C. § 1506

permit private citizens to maintain common law tort actions in state courts for the adverse consequences of the regulated activity?

2. In light of the consistent - and recent - expressions by the FAA as well as the Federal judiciary, that airport operators have power to control the use of their airports in order to prevent the infliction of jet noise injuries on neighboring people and properties, is it contrary to Federal law for a state court to deprive airport neighbors of the right to sue an airport on common law tort causes of action on the ground that

- local regulation is prohibited;
- an award of damages is the same as regulation;
- therefore an award of damages is prohibited?

3. Are damage actions brought due to jet aircraft noise around airports (where the aircraft, operating conditions, geographical conditions, etc. are different for each airport) on tort theories based on failure of the airport operator to

take steps to protect airport neighbors from the noise, more appropriately brought against the individual airport operators (who each have the authority to determine where the airport is located and what kind of aircraft are permitted to use it) in state courts, rather than against the United States (on the theory that the entire field has been "federally pre-empted" and any fault therefore resides in the United States) in U.S. District Courts?

Constitutional, Statutory and Regulatory Provisions

The following constitutional, statutory and regulatory provisions are involved in this Petition. Each is reproduced in full in Appendix "B" attached hereto:

United States Constitution, Article VI, Clause 2;

42 U.S.C. § 1857h-2(e);

49 U.S.C. § 1506;

14 C.F.R. § 36.5.

STATEMENT OF THE CASE

This is an action brought by more than 260 families (more than 900 people) to recover damages from the San Diego Unified Port District (the operator of Lindbergh Field in San Diego, California) for damage to person and property caused by the noise, fumes, smoke and vibrations created by jet aircraft operating to and from Lindbergh Field.

The Homeowners seek damages to their property and their person on the following legal theories:

- inverse condemnation;
- nuisance;
- negligence;
- trespass;
- operating without a valid permit from the California Department of Aeronautics;
- breach of grant agreements with the FAA which require protection of the interests of airport neighbors as a

pre-condition to obtaining Federal funds (see City of Inglewood v. City of Los Angeles [9th Cir. 1971] 451 F.2d 948).

The Port District demurred to the counts sounding in nuisance, negligence, trespass, and operating without a valid state airport permit. The ground of the demurrer was that "federal pre-emption" somehow immunized the Port District from the consequences of any of its actions.

The Superior Court overruled the demurrer.

Thereafter, the Port District sought an extraordinary writ, commanding the Superior Court to sustain the demurrers.

Although the Court of Appeal purported to deny the issuance of a peremptory writ (67 Cal.App.3d at 378), it instructed the trial court not to permit the recovery of any tort damages based on noise, fumes, vibrations and soot created by aircraft in flight. That instruction is legally erroneous (as discussed hereafter) and is tantamount to the issuance of a writ.

In a capsule, the Court of Appeal held:

- the Federal government has preempted all control of aircraft; and
- as a consequence, the Port District (as airport operator) has no control over aircraft; and therefore,
- since the Port District cannot control the source of the noise (i.e., the aircraft), it cannot be liable in tort for the noise produced by aircraft beyond the Port District's control.

This holding is contrary to Federal statutory and case law, as well as the most recent expressions of the FAA as to the power of local airport operators to control aircraft which use their facilities.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

First. Assuming, arguendo, that the Federal Government has preempted the regulation of aircraft in flight, Congress EXPRESSLY stated that common law suits for damages are permitted.

The Homeowners have not asked the Superior Court to issue any orders to the Port District to control its method of operations. While such action might be appropriate, all that is sought is money damages. Nonetheless, the Court of Appeal concluded that:

- local regulation is prohibited;
- an award of damages is the same as regulation;
- therefore an award of damages is prohibited.

The Court of Appeal is wrong.

When Congress passed the Federal Aviation Act (49 U.S.C. § 1301 et seq.), it included the following (49 U.S.C. § 1506):

> "Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."

Thus, even if Congress intended to preempt regulation, it also intended to permit actions for damages for the adverse consequences of the regulated activity.

Second. The Federal Government did NOT intend to completely preempt the field of aircraft regulation so as to prevent airport proprietors from controlling the noise nuisances created by aircraft using their facilities.

The United States government has repeatedly taken the position that the proprietor of an airport - such as the Port District at bench - has the power to regulate the use of its airport in order to protect its neighbors from jet aircraft nuisances. Indeed, the airport proprietor has the ultimate control: the power to decide whether specific types of

aircraft may operate from its airport (see 14 C.F.R. § 36.5).

The most recent expression of this position was on November 18, 1976, in a document issued by the Federal Aviation Administration, entitled Aviation Noise Abatement Policy. There, the FAA states:

> "Our concept of the legal framework underlying this policy statement is that proprietors retain the flexibility to impose such restrictions if they do not violate any Constitutional proscription. We have been urged to undertake - and have considered carefully and rejected - full and complete federal preemption of the field of aviation noise abatement. In our judgment the control and reduction of airport noise must remain a shared responsibility among airport proprietors, users, and governments." (p. 34; emphasis added.)

> "The primary obligation to address the airport noise problem always has been and remains a local responsibility." (p. 2)

Thus, in light of the FAA's recent, explicit comment that it has ". . . considered carefully and rejected - full and complete federal preemption of the field of aviation noise abatement . . .", it is hard to understand how the Court of Appeal could characterize as "correct" (67 Cal.App.3d at 369) the conclusion that:

> ". . . federal preemption of the field of airport noise regulation leaves no room for local controls -- including civil tort actions for money damages." (67 Cal.App.3d at 368)

Third. The decision conflicts with earlier decisions of federal courts on an issue of federal law.

Federal courts have recently and repeatedly held that an airport operator has power to regulate aircraft to

control noise (Air Transport Assn. v. Crotti [N.D. Cal. 1975] 389 F.Supp. 58, 63-64 [three judge District Court]; National Aviation v. City of Hayward [N.D. Cal. 1976] 418 F.Supp. 417, 424; British Airways Board and Compagnie Nationale Air France v. Port Authority of New York & New Jersey [2d Cir. 1977] Docket no. 77-7237).

The Court of Appeal expressly chose to disregard these holdings of Federal courts on issues of Federal law (67 Cal. App.3d at 368, 374).[1/]

Finally. The decision of the Court of Appeal conflicts with the clear policy of this Court that the airport operator is responsible for injuries inflicted on airport neighbors by airport users.

2/ Air Transport and National Aviation were expressly considered and disregarded by the Court of Appeal. British Airways Board, the most recent expression of this rule by a Federal Court, was decided after the Court of Appeal's decision herein.

This policy was announced in 1962 in Griggs v. Allegheny County (1962) 369 U.S. 84. The Court made it plain that since it is the individual airport operator that decides where its airport is to be located, how much land is to be acquired for buffer zones and what type of aircraft service is desired, the airport operator is liable for injuries inflicted on neighbors. This Court had before it in Griggs all potentially liable defendants, the airport operator, the airlines and the United States. This Court held that liability for damages caused by aircraft flight rested with the airport operator.

FEDERAL STATUTES EXPRESSLY AUTHORIZE THE TYPE OF COMMON LAW ACTIONS FORECLOSED BY THE COURT OF APPEAL

The Court of Appeal's conclusion that tort actions for damages are somehow "federally pre-empted" is puzzling. It is all the more so when the argument is viewed in light of the very statutes to which the Port District and the Court of Appeal attribute this "pre-emptive" effect.

A study of these statutes is fundamental to determine congressional intent. This Court has repeatedly held that preemption rests on Congressional intent to preempt. For example, in Schwartz v. Texas (1952) 344 U.S. 199, 202, 203, the Court stated:

> "If Congress is authorized to act in a field, it should manifest its intention clearly. It will not be presumed that a federal statute was intended to supersede the exercise of the power of the

state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed.

> "The principle thus applicable has been frequently stated. It is that the Congress may circumscribe its regulation and occupy a limited field, and that the intention to supersede the exercise by the State of its authority as to matters not covered by the federal legislation is not to be implied unless the Act of Congress fairly interpreted is in conflict with the law of the State. [citations]" (Emphasis added.)

Well, then, what's the situation at bench? Did Congress intend a total preemption? Or, was its goal more limited?

Congress has enacted four groups of statutes regulating the field of aviation. Each of them permits damage actions.

The Federal Aviation Act of 1958, 49 U.S.C. §§ 1301-1542 is the most pervasive.

It occupies chapter 20 of Title 49 of the United States Code, and governs the CAB as well as the FAA, and economic as well as safety and noise regulation of civil aviation.

Notwithstanding this extensive regulation, 49 U.S.C. § 1506 expressly permits common law suits such as those at bench:

> "Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."

The Airport and Airway Development Act of 1970 (49 U.S.C. §§ 1701-1742) has been held expressly enforceable by airport neighbors in suits against airport operators. City of Inglewood v. City of Los Angeles (9th Cir. 1971) 451 F.2d 948, 955-956.

The Clean Air Amendments of 1970, 42 U.S.C. § 1857 et seq., also expressly permits suits by private citizens, in § 1857h-2(e):

> "Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency)."

The Noise Control Act of 1972, 49 U.S.C. § 1431, is codified as part of chapter 20 of Title 49 U.S.C. It is thus subject to 49 U.S.C. § 1506 quoted above.

Indeed, this Court recently confirmed the propriety of private, common law actions in areas subject to exclusive federal (CAB) regulation. See Nader v. Allegheny Airlines, Inc. (1976) 426 U.S. 290, 298-300.

Thus, assuming arguendo that Congress had an intent that local regulation be "pre-empted", private actions for damages are permitted for any adverse consequences of the regulated activity.

This Court recently dealt with a similar problem (also arising in California)

under the National Labor Relations Act. In Farmer v. United Brotherhood of Carpenters (1977) ___ U.S. ___, 51 L.Ed.2d 338, this Court vacated the judgment of a California Court of Appeal and held that the National Labor Relations Act did not preempt the right of a union member to sue a union for tort in state court. In upholding the individual's right to maintain common law, state court suits in a Federally regulated area, this Court emphasized the state's interest in protecting its citizens from tortious injury, and the concurrent lack of Federal interest in protecting tortious conduct (___ U.S. at ___, 51 L.Ed.2d at 349-352).

The same is true here. California has a legitimate interest in protecting its citizens from tortious injury inflicted by jet noise. Likewise, though Congress has sought to foster aviation, it does not condone nor require operation of jet aircraft in such a manner or location that injury is inflicted on airport neighbors. Quite the contrary. As discussed hereafter, the position of the Federal government has been consistent and clear: it is the responsibility of

each airport operator to ensure that its airport is operated under such regulations as will avoid injury to nearby people and property - even if that means excluding noisy aircraft.

As this Court expressed it in Florida Lime and Avocado Growers, Inc. v. Paul (1963) 373 U.S. 132, 146-147:

> ". . . we are not to conclude that Congress legislated the ouster of this California statute by the marketing orders in the absence of an unambiguous congressional mandate to that effect. We search in vain for such a mandate."

The same is true in the case at bench. One would indeed ". . . search in vain for . . . a mandate" that common law tort actions are barred by "federal pre-emption". The search would be as futile as Ponce de Leon's quest for the "fountain of youth", because Congress expressly said the contrary: common law actions are permitted.

THE FEDERAL GOVERNMENT HAS EXPRESSLY REJECTED THE COURT OF APPEAL'S IDEA THAT, ". . . FEDERAL PREEMPTION OF THE FIELD OF AIRPORT NOISE REGULATION LEAVES NO ROOM FOR LOCAL CONTROLS . . ." (67 Cal.App.3d at 368)

The Court of Appeal's conclusion that the FAA has preemptive power to issue regulations to control jet noise is expressly disavowed by the FAA itself. In fact, the FAA says that significant authority and responsibility properly and necessarily remain with the airport operator. Since preemption cannot exist without an intent to preempt, the FAA's views are important. (See San Diego Bldg. Trades Council v. Garmon [1959] 359 U.S. 236, 243, 247.)

The views of the Federal government are most recently expressed in a document issued by the FAA on November 18, 1976, entitled Aviation Noise Abatement Policy.

The Aviation Noise Abatement Policy makes it clear that the FAA does not believe it has the preemptive power attributed to it by the Court of Appeal,

or that the State of California (operating through the Port District) is impotent to issue regulations to control jet noise for the protection of Californians. The following passages from the FAA policy statement are revealing:

> "Our concept of the legal framework underlying this policy statement is that proprietors retain the flexibility to impose such restrictions if they do not violate any Constitutional proscription. We have been urged to undertake - and have considered carefully and rejected - full and complete federal preemption of the field of aviation noise abatement. In our judgment the control and reduction of airport noise must remain a shared responsibility among airport proprietors, users, and governments." (p. 34, emphasis added.)

> "The primary obligation to address the airport noise problem always has been and remains a local responsibility." (p. 2)

Thus, in light of the FAA's recent, explicit comment that it has ". . . considered carefully and rejected - full and complete federal preemption of the field of aviation noise abatement . . ." (Policy Statement, p. 34), it causes wonder as to how the Court of Appeal could characterize as "correct" (67 Cal.App.3d at 369) the conclusion that:

> ". . . federal preemption of the field of airport noise regulation leave no room for local controls -- including civil tort actions for money damages." (67 Cal.App.3d at 368)

There are sound policy reasons for the FAA's rejection of total preemption. These are discussed in the FAA policy statement (p. 50):

> "The Airport Proprietor's Responsibility
>
> "Substantial benefits will be achieved through federal actions to abate source noise and control operational flight procedure and airspace, but much of the noise

> problem is airport-specific and must be addressed by individual proprietors. Noise impact at any airport is in part due to local decisions on airport location, continuation of airport operations on a particular site, the layout and size of an airport and the purchase of buffer areas for noise abatement purposes. It is local decision-making that permits residential development near an airport. For these reasons, the Supreme Court concluded that proprietors are liable for aircraft noise damages. In addition, airport proprietors, particularly those that are public agencies, generally encourage more service to their airports in Civil Aeronautics Board route proceedings.
>
> * * *
>
> "The airport proprietor is closest to the noise problem, with the best understanding of both conditions, needs and desires, and

> the requirements of the air carriers and others that use his airport. The proprietor must weigh the costs the airport and the community must pay for failure to act, and consider those costs against any economic penalties that may result from a decision to limit the use of the airport through curfews or other restrictions for noise abatement purposes." (Emphasis added.)

The injuries alleged in the complaint (though obviously caused by noise emitted [in part] by jet aircraft in flight) are the result of the failure by the Port District to face its responsibilities. While the FAA retains control of aircraft in flight, the injuries inflicted on the Homeowners are the result of what the FAA referred to as "airport-specific" problems. In fact, the "airport-specific" problems noted above by the FAA are all involved at bench.

- curfew;
- airport location;

- continuation of airport operations on a particular site;
- the layout and size of the airport; and
- the [non-] purchase of buffer areas.

If - as the FAA concludes - the Port District has the power to act, why should the Court of Appeal immunize the Port District from the consequences of its failure to act?

The consequences of permitting the precedent to stand will be widespread. Airport neighbors, seeking recompense for airport noise damage, will go to the Federal courts - as they will be the only courts which can give damages for injury to person as well as property. There are thousands of such cases pending in California courts now. And others across the Nation. Their shift to Federal courts will not serve the ends of justice. The financial consequences for airport operators' mismanagement of their airports will fall on the United States. It hardly seems to require argument to point out

the psychological effect on airport operators if the financial consequence of their indifference to airport noise is borne by someone else. Too little attention is already paid to the plight of airport neighbors under the existing liability burden.

The kind of control which the FAA believes that airport proprietors have is likewise revealing:

> "Airport Proprietors are primarily responsible for planning and implementing action designed to reduce the effect of noise on residents of the surrounding area. Such actions include optimal site location, improvements in airport design, noise abatement ground procedures, land acquisition, and restrictions on airport use that do not unjustly discriminate against any user, impede the federal interest in safety and management of the air navigation system, or unreasonably interfere with interstate or foreign commerce." (Policy Statement, p. 5; emphasis added.)

This conclusion conforms to the FAA's rejection of total federal preemption. Note particularly that airport operators may restrict airport use even though the restrictions may discriminate against some airport users and interfere with interstate and foreign commerce, so long as the discrimination is not "unjust", and the interference with commerce is not "unreasonable".

Thus, contrary to the Court of Appeal's conclusion, the FAA believes that ". . . the reasonableness of the operation of airports . . ." (67 Cal.App.3d at 369) is subject to examination. How else could one determine whether discrimination is "unjust", or interference with commerce is "unreasonable"?

In its most recent policy statement, the FAA has forcefully and repeatedly told airport operators, like the Port District, that they not only have the power to so act, but they must exercise that power. (See Policy Statement, pp. 5, 33, 34, 50, 47.)

In short, the very federal agency for which the Court of Appeal says Congress

preempted the field, has expressly concluded that:

1. Congress did no such thing; and
2. neither Congress nor the courts should do so; because
3. "The primary obligation to address the airport noise problem always has been and remains a local responsibility." (Policy Statement, p. 2)

"Our concept of the legal framework underlying this policy statement is that proprietors retain the flexibility to impose such restrictions if they do not violate any Constitutional proscription. We have been urged to undertake - and have considered carefully and rejected - full and complete federal preemption of the field of aviation noise abatement. In our judgment the control and reduction of airport noise must remain a shared responsibility among airport

proprietors, users, and governments." (Policy Statement, p. 34; emphasis added.)

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THE COURT OF APPEAL MISREADS FEDERAL AUTHORITY AND ERRONEOUSLY CONCLUDES THAT THE PORT DISTRICT (AS AIRPORT OPERATOR) HAS NO POWER TO CONTROL THE NOXIOUS BY-PRODUCTS OF THE JET AGE EMITTED BY THE PORT DISTRICT'S TENANTS

The Court of Appeal adopted the Port District's fervent argument that this Court, in City of Burbank v. Lockheed Air Terminal (1973) 411 U.S. 624, held that airport operators can exert no control over jet noise.

This Court held no such thing.

In Burbank, the municipality which sought to regulate the airport was not the airport operator. All that was decided in Burbank was that municipalities cannot use their police powers to regulate airports which they do not operate. The power of an airport operator - as

landlord[2/] - to control what goes on at its own airport was expressly not decided:

> ". . . But, we are concerned here not with an ordinance imposed by the City of Burbank as 'proprietor' of the airport, but with the exercise of police power. While the Hollywood-Burbank Airport may be the only major airport which is privately owned, many airports are owned by one municipality yet physically located in another. For example, the principal airport serving Cincinnati is located in Kentucky. Thus, authority that a municipality may have as a landlord is not necessarily congruent with its police power. We do not consider here what limits, if any, apply to a municipality as a proprietor." (City of Burbank v. Lockheed Air Terminal [1973] 411 U.S. 624, 636, fn. 14.)

2/ The conventional tool airport proprietors use to control noise is their lease to the airline users. By agreement, the airline is limited as to hours, class of aircraft, number of flights, etc.

The problem with the Court of Appeal's analysis in this case, is that it confuses two separate (but peacefully co-existing) lines of federal authority. One line deals with the power of airport proprietors. The other deals with the power (or more properly, lack of power) of local governments in or near which airports are located, but which are not the airport proprietor.

Burbank is simply the latest in a line of cases initiated by the Cedarhurst, Hempstead and Audubon Park litigation,[3/] in which the courts have consistently held that a government agency other than the airport operator has no power to

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3/ Allegheny Airlines v. Village of Cedarhurst (E.D.N.Y. 1955) 132 F. Supp. 871, aff'd (2d Cir. 1956) 238 F.2d 812; American Airlines, Inc. v. Town of Hempstead (E.D.N.Y. 1967) 272 F. Supp. 226, aff'd (2d Cir. 1968) 398 F.2d 369; American Airlines, Inc. v. City of Audubon Park (W.D. Ky. 1968) 297 F. Supp. 207, aff'd (6th Cir. 1969) 407 F.2d 1306.

issue regulations dealing with aircraft noise.

On the other hand, no court - before the opinion brought to this Court for review - has ever held that an airport operator itself lacked the power to so regulate. Quite the contrary. See, e.g., Port of New York Authority v. Eastern Airlines, Inc. (E.D.N.Y. 1966) 259 F. Supp. 745; Burbank, supra, 411 U.S. at 636, fn. 14; National Aviation v. City of Hayward (N.D. Cal. 1976) 418 F. Supp. 417; Air Transport Assn. v. Crotti (N.D. Cal. 1975) 389 F. Supp. 58, 63-64 (three judge District Court); British Airways Board and Compagnie Nationale Air France v. Port Authority of New York & New Jersey (2d Cir. 1977) Docket No. 77-7237.

This consistent position of the Federal judiciary was perhaps best summed up by the three judge District Court in Crotti, supra, 389 F. Supp. at 63-64:

> "It is now firmly established that the airport proprietor is responsible for the consequences which attend his operation of a public airport; his right to

> control the use of the airport is a necessary concomitant, whether it be directed by state police power or his own initiative. . . . That correlating right of proprietorship control is recognized and exempted from judicially declared preemption by footnote 14." (Emphasis added; footnote omitted.)

The most recent expression occurred in the Concorde case (British Airways Board, supra), where the Court of Appeals rejected the notion that the Port Authority of New York and New Jersey lacked the power to establish the conditions and regulations under which the Concorde might be allowed to use its airport facilities:

> "We need not tarry long over the issue that heretofore has occupied center stage in this litigation. We believe the grounds for Judge Pollack's grant of summary judgment, that Secretary Coleman's order preempted the conflicting exercise

of power by the Port Authority, is simply untenable and erroneous. Accordingly, we will reverse.

"In response to our request, the United States filed an amicus brief in which it urged that Secretary Coleman's order was never intended to deprive the Port Authority of the right to condition utilization of the facilities at JFK on the Concorde's compliance with reasonable noise regulations. The Government, indeed, went further, and denied that existing legislation authorized the Executive under any circumstances to preempt airport proprietors from promulgating their own noise regulations.

"This conclusive statement of the United States position confirms our independent assessment of the public record." (slip opinion, p. 12; emphasis added.)

Neither Congress nor the Federal judiciary intended to bar airport owner-operators from regulating their own airports.

Quite the contrary.

The Port District's misreading of the federal authorities has caused much grief for the neighbors of Lindbergh Field, as the Port District has for many years refused to take action to protect them. If the Port District's lawyers have told their client what they tell the courts, it then becomes understandable why the Port District has seemed so arrogant in its indifference to its neighbors' plight.

Sadly, the Court of Appeal has now put into mischief-making precedent this erroneous, self-abnegating reasoning.

It is time the Port District ceased its self-imposed regulatory celibacy and acted to abate the problems. That would be a constuctive way to rid itself of the prospect of litigation such as this, rather than putting its resources toward efforts to muddy the law, such as the one presented to this Court.

CONCLUSION

With respect, the premise of the Court of Appeal (i.e. that awarding damages is tantamount to regulation, and regulation is "federally preempted") is doubly flawed:

> first, as the FAA recently noted, the field of regulation is not preempted; and
>
> second, regardless of regulatory preemption, Congress expressed its intent that common law actions be allowed to proceed.

WHEREFORE, the Homeowners pray that a writ of certiorari issue, so that all are made aware of who is responsible for evolving a solution to jet noise problems.

Respectfully submitted,

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Attorneys for Petitioners

APPENDIX A

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE, STATE OF CALIFORNIA

4 Civ. No. 16142

(Sup. Ct. No. 367963)

THE SAN DIEGO UNIFIED PORT DISTRICT, et al,

Petitioners,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SAN DIEGO,

Respondent.

ROGER A. BRITT, et al,
and
EVERETT SINCLAIR BANKS, et al.

Real Parties in Interest.

PROCEEDING in prohibition/mandate. Order to show cause discharged. Petition for peremptory writ denied.

Luce, Forward, Hamilton & Scripps, by Louis E. Goebel, Michael S. Gatzke, Ronald W. Rouse and Walter J. Cummings, III, for Petitioners.

No appearance for Respondent.

Fadem, Berger, McIntire & Norton, by Michael M. Berger and Patsy Mumiston Car Carter, for Real Parties in Interest.

INTRODUCTION

A group of homeowner-plaintiffs (Britt)[1] is seeking damages on various theories from the San Diego Unified Port District (Port District), the operator is San Diego International Airport (Lindbergh Field). Before this Court, the parties are engaged in two theaters of litigation. This proceeding (4 Civ. No. 16142) is a challenge to an order overruling a general demurrer to causes of action in nuisance, negligence, trespass and failure to obtain a state operating permit. The other proceeding (4 Civ. No.

FOOTNOTE 1: Plaintiffs are 936 individuals and one church. They brought two actions, Britt, et al, v. San Diego Unified Port Dist., San Diego Superior Court No. 367963, and Banks, et al, v. San Diego Unified Port Dist., San Diego Superior Court No. 379755, which were consolidated by the superior court.

16053), retransferred to this Court by the Supreme Court for hearing, challenges on First Amendment grounds the denial of an order protecting Britt from discovery. Except for the possibility the sustaining of demurrers to the tort causes of action might render moot the discovery question, the two proceedings are unrelated.

THE ACTION

Plaintiffs allege in Count 1 the operation of Lindbergh Field by the Port District has so interfered with their ownership rights as to constitute a taking of their property for public use within the meaning of the Federal and State Constitutions. They claim such interference, usually referred to as inverse condemnation, entitles them to just compensation. The Port District does not contest the overruling of its demurrer to this count, accepting for the purposes of these proceedings that if a taking has occurred the Port District is the

responsible entity.[2]

In addition, plaintiffs seek recovery for both property damage and personal injury on theories of nuisance (Counts 3 and 4), negligence (Counts 5 and 6), trespass (Counts 7 and 8), and failure of the Port District to obtain a proper state operating permit (Counts 9 and 10). The respondent court overruled a general demurrer to these Counts (3 through 10) and it is that action which is contested in this petition by the Port District. Other remaining Counts (13 and 14), for breach of contractual obligations to a third party beneficiary under contracts between the Port District and the FAA, are not at issue.

ISSUE

The issue presented is whether federal law in the field of aircraft noise regulation preempts all state and local

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FOOTNOTE 2: See Griggs v. County of Alle Allegheny, Pennsylvania, 369 U.S. 34 [82 S. Ct. 531]. But see Note, "Shifting Aircraft Noise Liability to the Federal Government," 61 Va. L. Rev. 1299.

controls and therefore precludes civil actions against airport operators based upon common law or statutory causes of action.

DISCUSSION

A. Propriety of reviewing the question on petition for prerogative writ.

Only with "extreme reluctance" are prerogative writs employed to afford intermediate review of rulings on pleadings (Babb v. Superior Court, 3 Cal.3d 841, 851).

> "'In most . . . cases, as is true of most other interim orders, the parties must be relegated to a review of the order on appeal from the final judgment.'" (Id., quoting Oceanside Union School Dist. v. Superior Court, 58 Cal.2d 180, 185, fn. 4.)

Nevertheless, in circumstances of a "grave" nature" or of "significant legal impact," appellate courts may be compelled to intervene through the issuance of an extraordinary writ (Babb v. Superior Court, supra, 3 Cal.3d 841, 851).

The issue presented is a significant question of law. If the respondent court erroneously permitted tort causes of

action to be pursued, substantial discovery and trial expenses are needlessly imposed on the Port District (directly) and the public (indirectly). The difference between the action as it stands, requiring discovery of the medical histories of hundreds of individual plaintiffs, and the action as the Port District contends it should stand, requiring "merely" appraisal of about 200 parcels of property, is spacious. In the memorandum of points and authorities in opposition to the petition, Britt argues only that the respondent court correctly decided the issue on its merits and nowhere suggests review should be deferred until appeal from judgment.[3] For these reasons our intervention by issuance of an order to show cause was justified.

B. Merits.

1. Contentions.

The Port District summarizes its argument as follows:

FOOTNOTE 3: See 5 Witkin, Cal. Proc.2d (1971), Extraordinary Writs, §43, p. 3817.

"1. Federal legislation and authorized agency regulation in the field of aircraft and airport noise is so pervasive that it has preempted all state and local controls. City of Burbank v. Lockheed Air Terminal (1973) 411 U.S. 624, 638, 93 S.Ct. 1854 . . . . The multitude of interrelated considerations in this field permits only a uniform and exclusive system of Federal regulation. Id., 411 U.S. at 639.

"2. This preemption precludes not only local regulation by legislative action, but regulation by local judicial action as well. E.g., Luedtke v. County of Milwaukee, 371 F.Supp. 1040, 1044 (E.D. Wis. 1974), aff'd, 521 F.2d 387, 390-391.

"3. The tort counts (Counts 3-10) of plaintiffs' complaint require adjudication of the 'reasonableness' of conduct in the operation of Lindbergh Field. These counts require the respondent Court to adjudicate questions of whether or not noise impact on plaintiffs resulting from jet aircraft operations at Lindbergh Field, if any, could be reduced by changes in specific opertional procedures.

"4. The awarding of money damages is every bit as much a regulation of conduct by a court as the exercise of its equitable jurisdiction to regulate by injunction. E.g.,

San Diego Bldg. Trades Council v. Garmon (1959) 359 U.S. 236, 246-247, 79 S.Ct. 773. . . . Indeed, plaintiffs' request for money damages under the tort counts is merely a back door approach to placing airport operational procedures under judicial direction.

"5. The inverse condemnation count is not directly affected by this federal preemption because:

"a. If there is judicial determination that the level of interference with plaintiffs' properties is sufficiently great to constiture a 'taking' under the Fifth and Fourteenth Amendments, (United States v. Causby (1945) 328 U.S. 256, 66 S.Ct. 1062 . . .) they are entitled to 'just compensation' because Congressional or agency action may not operate to deprive citizens of constitutional rights; and,

"b. Inverse condemnation as a legal theory of recovery does not require adjudication of the conduct of airport operational procedures. Essentially, it only requires findings of a substantial interference with private property for public purposes and a diminution in the market value of the property."

Britt responds in essence the duty of an airport proprietor, as land occupier,

to operate airport facilities nontortiously is unaffected by cases recognizing federal preemption in the field of noise regulation. Distinction is drawn between the exercise of police power by a municipality to control airport noise and the exercise of proprietary power by the owner-operator of an airport.

2. Discussion.

a. Federal Law.

The seminal case in the area of federal preemption of airport noise regulation is City of Burbank v. Lockheed Air Terminal Inc., 411 U.S. 624 [93 S.Ct. 1854]. Both parties rely on this case in support of their positions and claim it disposes of the issue at bar.

In Burbank the owner-operator of the Hollywood-Burbank Airport brought suit in federal court against the City of Burbank to enjoin enforcement of a city ordinance forbidding any pure jet aircraft from taking off from the airport getween 11 p.m. of one day and 7 a.m. of the next, and forbidding the airport operator from permitting any such takeoffs. The District

Court enjoined enforcement of the ordinance, and the Court of Appeals for the Ninth Circuit affirmed. In a five-to-four decision, the United States Supreme Court affirmed, holding "FAA, now in conjunction with EPA, has full control over aircraft noise, pre-empting state and local control." (Id. p. 633 [93 S.Ct. p. 1859].)

The United States Supreme Court expressly left open what limits, if any, apply to the exercise of proprietary rights by a municipality which owns and operates an airport. In a controversial footnote the Court explained:

"The letter from the Secretary of Transportation also expressed the view that 'the proposed legislation will not affect the rights of a State or local public agency, as the proprietor of an airport, from issuing regulations or establishing requirements as to the permissible level of noise which can be created by aircraft using the airport. Airport owners acting as proprietors can presently deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory.' (Emphasis added.) This portion as well was quoted with approval in the Senate Report. Ibid.

"Appellants and the Solicitor General submit that this indicates that a municipality with jurisdiction over an airport has the power to impose a curfew on the airport, notwithstanding federal responsibility in the area. But, we are concerned here not with an ordinance imposed by the City of Burbank as 'proprietor' of the airport, but with the exercise of police power. While the Hollywood-Burbank Airport may be the only major airport which is privately owned, many airports are owned by one municipality yet physically located in another. For example, the principal airport serving Cincinnati is located in Kentucky. Thus, authority that a municipality may have as a landlord is not necessarily congruent with its police power. We do not consider here what limits, if any, apply to a municipality as a proprietor." (Id. p. 635, fn. 14 [93 S.Ct. p. 1861, fn. 14].)

Britt contends the Court in Burbank expressly "acknowledged that the operator of an airport does have the power to issue regulations." Since this is so, the conduct of the Port District as operator of Lindbergh Field is not shielded by federal preemption; its alleged impotence to impose reasonable noise controls is illusory, and it should be held responsible for its tortious conduct. Such an interpretation of footnote 14 ignores the rationale of the text of the opinion.

A majority of the Supreme Court reasoned in Burbank the interdependence of such concerns as safety, efficiency and noise control "requires a uniform and exclusive system of federal regulation if the congressional objectives underlying the Federal Aviation Act are to be fulfilled." (Id. pp. 638-639 [93 S.Ct. p. 1862].) If a curfew interferes with this perceived requirement of uniformity, it should make no difference whether the curfew is imposed on the authority of local police power or the owner's proprietary power. The impact of the curfew remains the same -- interference with flight schedules at other airports and local flight congestion immediately before and after the hours of curfew.

Britt thus offers an anomaly: a municipality or governmental agency may impose noise regulations in its capacity as airport proprietor which it could not impose under its police power. Even though the District Court for the Northern District of California has very recently reached such a conclusion in

National Aviation v. City of Hayward, Cal. 418 F.Supp. 417, we doubt the Supreme Court intended such a result.

The Burbank Court acknowledged "the Hollywood-Burbank Airport may be the only major airport which is privately owned." (City of Burbank v. Lockheed Air Terminal Inc., supra, 411 U.S. 624, 635, fn. 14 [93 S.Ct. 1854, 1861, fn. 14].) The vast majority of national airports are operated by municipalities or governmental entities such as the Port District. If the limitation of footnote 14 is construed as Britt suggests, local regulation by municipal airport "proprietors" would not be preempted by federal law, and "Burbank becomes a decision of nearly unique application" (Warren, "Airport Noise Regulation: Burbank, Aaron, and Air Transport," 5 Environmental Affairs 97, 106, fn. 56). "If the great bulk of airport noise cases are not to be affected. . . . the rationale of Burbank is defeated" (Id. p. 106).

The Port District focuses on the reasoning of the Burbank case. Counsel contends federal preemption of the field of

airport noise regulation leaves no room for local controls -- including civil tort actions for money damages. Relying primarily upon San Diego Building Trades Council, etc., v. Garmon, 359 U.S. 236 [79 S.Ct. 773], the Port District urges the awarding of money damages is as much a regulation of conduct as an injunction or legislative activity. In San Diego Building Trades Council, the United States Supreme Court stated:

> "Our concern is with delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered. Such regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy. Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme." (Id. pp. 246-247 [79 S.Ct. 780].)

The Port District urges if money damages were to be awarded in this action, it would be punished for conduct which is

essentially within federal jurisdiction. If juries in 50 states are permitted to assess the reasonableness of the operation of airports, it would be impossible to attain a national uniform scheme of airport noise regulation. This conclusion seems correct.

The Port District adamantly urges Luedtke v. County of Milwaukee, 521 F.2d 387, is indistinguishable from this action. In that post-Burbank case, property owners were suing the County of Milwaukee, as owner and operator of General Mitchell Field, the major Milwaukee airport, and five federally certified airlines which utilized the airport facilities. The plaintiffs charged that aircraft, in taking off and landing at Mitchell Field, flew over their property at low altitudes, causing noise, vibration, fumes and the dropping of dust and noxious substances on their property. The plaintiffs claimed the defendants deprived them of their property without just compensation in violation of the Constitution. In addition, they claimed the defendants created a nuisance in violation of state law.

> "As relief, the plaintiffs [sought] actual and punitive damages, a mandatory injunction directing the County to initiate condemnation proceedings against their property, and a promulgation, by the district court, of rules and regulations to govern the aircraft and airport operations at Mitchell Field." (Id. p. 389.)

The District Court granted defendant's motion to dismiss the complaint. On appeal the United States Court of Appeals for the Seventh Circuit acknowledged the right of the plaintiffs to seek inverse condemnation damages, but rejected their claims for injunctive relief and tort damages. The Court stated:

> "The district court properly held that relief in the form of judicially-made rules and regulations to govern the airport and airline operations at Mitchell Field was not available to the plaintiffs. In City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 93 S.Ct. 1854, 36 L. Ed.2d 547 (1973), the Supreme Court held that the Federal Aviation Administration (FAA), in conjunction with the Environmental Protection Agency (EPA), 'has full control over aircraft noise, pre-empting state and local control.' 411 U.S. at 633, 93 S.Ct. at 1859. '[T]he pervasive

> control vested in EPA and in FAA under the [Noise Control Act of 1972] leave[s] no room for local curfews or other local controls.' 411 U.S. at 638, 93 S.Ct. at 1862. The Court has similarly noted that in the area of aircraft emissions, Congress 'has also pre-empted the field.' Washington v. General Motors Corp., 406 U.S. 109, 114, 92 S.Ct. 1396, 31 L.Ed.2d 727 (1972). See Virginians for Dulles and Volpe 344 F.Supp. 573, 579 (E.D. Va. 1972). As the court below recognized, it is irrelevant that the plaintiffs here are asking a federal district court, rather than a state body, to promulgate the rules governing Mitchell Field. The rules and regulations which the plaintiffs seek would, nonetheless, result in the type of local control which the Supreme Court in Burbank found to be invalid.
>
> ". . . . . .
>
> "The remainder of the plaintiffs' claims charge both defendants with common law nuisance and negligence and violation of § 114.04 of the Wisconsin Statutes, which makes it unlawful, inter alia, for an aircraft to fly 'at such a low altitude as to interfere with the then existing use to which the land or water, or the space over the land or water, is put by the owner.' These claims are apparently based on pendent jurisdiction. The district court held that even if it were to consider these allegations, see United

Mine Workers v. Gibbs, 383 U.S. 715, 725-726, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966), the plaintiffs' action on these counts could not be maintained. We agree.

"Since the federal laws and regulations have preempted local control of aircraft flights, Burbank, supra, the defendants may not, to the extent they comply with such federal laws and regulations, be charged with negligence or creating a nuisance. Similarly, § 114.04 of the Wisconsin Statutes cannot be invoked to make unlawful flights which are in accordance with federal laws and regulations. If, as the plaintiffs allege, the aircraft flights have resulted in the 'taking' of their property, the plaintiffs have actions at law to recover just compensation from the County. Griggs, supra; . . . . To the extent that the County may be violating the federal laws or regulations, the plaintiffs should, as explained. . . , exhaust their administrative remedies." Luedtke v. County of Milwaukee, 521 F.2d 387, 390-391.)

Since the tort causes of action were dismissed against the County of Milwaukee, as owner and operator of General Mitchell Field, as well as against the airline defendants, the case is factually on point. Britt's attempt to distinguish Luedtke is disingenuous.

The Port District correctly points out a decision of a lower federal court on a federal question, though not binding, is "persuasive and entitled to great weight" (People v. Bradley, 1 Cal. 3d 80, 86; see also 16 Cal.Jur.3d, Courts, §157, p. 288). The persuasiveness of the Luedtke decision is somewhat diminished, however, by the Court's use of the Burbank case to dismiss causes of action against two different types of defendants, the airport operator and the airlines, without distinction. In fact, the Burbank case involved an attempted exercise of police power by a nonproprietary city, and the Supreme Court expressly declined to consider what controls might be imposed by the owner-operator of an airport.

Two other recent federal decisions, Air Transport Association of America v. Crotti, 389 F.Supp. 58, and National Aviation v. City of Hayward, Cal., supra, 418 F.Supp. 417, bear on the issue of preemption. In Crotti an association of air carriers sued the managing officials of major California airports

seeking a declaratory judgment that state noise regulations adopted pursuant to the state Public Utilities Code were invalid. The challenged regulations were of two types: (1) Community Noise Equivalent Level (CNEL) standards, which prescribed for continued operation of airports with monitoring requirements aimed at achieving a future maximum noise level, and (2) Single Event Noise Exposure Level (SENEL) standards, which were prohibitions applied to the inseparable feature of noise generated by an aircraft engaged in flight.

The Association's position narrowed "to the simple contention that any control and regulation of the levels of noise generated by aircraft in direct flight is preempted by the federal government" (Air Transport Association of America v. Crotti, supra, 389 F.Supp. 58, 62), and the CNEL standards and related monitoring requirements and SNEL prohibitions were therefore void.

The District Court found this argument to be overbroad:

"We believe that the Airlines' total reliance upon Burbank is misplaced. The factual picture supporting Burbank is of narrow focus, a single police power ordinance of a municipality -- not an airport proprietor -- intending to abate aircraft noise by forbidding aircraft flight at certain night hours. The holding in Burbank is limited to that proscription as constituting an unlawful exercise of police power in a field pre-empted by the federal government, and we take as gospel the words in footnote 14 in Burbank: '[A]uthority that a municipality may have as a landlord is not necessarily congruent with its police power. We do not consider here what limits, if any, apply to a municipality as a proprietor.' (Emphasis supplied.)

> "It is now firmly established that the airport proprietor is responsible for the consequences which attend his operation of a public airport; his right to control the use of the airport is a necessary concomitant, whether it be directed by state police power or his own initiative." (Id. pp. 63-64.)

The Court then concluded the CNEL monitoring procedures, which were "a passive function" "innocuous to aircraft traffic" and not in direct conflict with federal regulations, were not affected by the Burbank case. The Court ruled.

> "The State dictated employment of shielding and ground level facility configurations, as well as development of compatible land uses under the provisions of CNEL, is so patently within local police power control and beyond the intent of Congress in the federal legislation that further discussion would be wasteful." (Id. p. 65.)

However the Court held:

> "The SENEL provisions and regulations are not so favored. We are satisfied and conclude that the SENEL provisions and regulations of noise levels which occur when an aircraft is in direct flight, and for the levying of criminal fines for violation, are a per se unlawful exercise of police power into the exclusive federal domain of control over aircraft flights and operation, and air space management and utilization in interstate and foreign commerce. The thrust of the Single Event Noise Exposure Levels is clear and direct and collides head-on with the federal regulatory scheme for aircraft flights delineated by and central to the Burbank decision." (Id. p. 65.)

This application of the "proprietor exception" of the Burbank case achieves some accomodation between state and federal interests. The Court focused

not on whether police or proprietary power was being exercised, but rather on the activity regulated. The CNEL regulations, which dealt with ground noise level management through land use planning, were not preempted; the SENEL regulations, which sanctioned the noise levels of aircraft themselves, were preempted. Airport land and facilities use (proprietary functions) were subject to local regulation, but noise emanating from aircraft in flight (federally regulated) was not.

In National Aviation v. City of Hayward, Cal., supra, 418 F.Supp. 417, four related commercial airlines sought to have a City of Hayward ordinance declared unconstitutional. The challenged ordinance, expressly enacted pursuant to the City's authority as owner, operator and proprietor of its local airport, prohibited all aircraft in excess of a fixed decibel level from landing or taking off from the Hayward Air Terminal between the hours of 11:00 p.m. and 7:00 a.m. The District Court defined its task at the outset:

> "[T]he Burbank court's finding of preemption was made only with regard to a nonproprietor municipality's attempt to regulate aircraft noise pursuant to its police power. Indeed, in footnote 14 of the majority opinion, Mr. Justice Douglas expressly acknowledges that the court 'do[es] not consider here what limits, if any, apply to a municipality as a proprietor.' 411 U.S. at 635-36 n. 14. As a result, this court must now attempt to do so." (Id. p. 421.)

There was no doubt if the ordinance had been passed by a local government not the proprietor of the airport, it would run afoul of Burbank and would constitute an impermissible exercise of police power in an area preempted by Congress.

The Court found itself

> " . . . caught on the horns of a particularly sharp dilemma: If on one hand, we follow the dicta in footnote 14 of the Burbank opinion, which is intended to comport with the court's holding in Griggs, we will severely undercut the rationale of Burbank's finding of preemption. If on the other hand, we disregard the proprietor exception as dicta in order to fully effecuate the Burbank rationale, we impose upon airport proprietors the responsibility under Griggs for obtaining the requisite noise easements, yet deny them the authority to control the level of

> noise produced at their airports." (Id. p. 424.)

The dilemma was resolved in favor of the ordinance for two reasons. First, the Court interpreted Air Transport Association of America v. Crotti, supra, 389 F. Supp. 58, 63-64, as holding "proprietorship control is recognized and exempted from judicially declared preemption by [Burbank's] footnote 14." The language quoted does not comport precisely either with footnote 14 or with what the court deciding Crotti, actually did. The Court in Burbank said merely: "We do not consider here what limits, if any, apply to a municipality as a proprietor." (Emphasis added.) That is a far cry from, "No limits apply to a municipality as a proprietor." Furthermore, both the CNEL and SENEL regulations considered in Crotti were exercises of state police power, rather than proprietary power. If the category of power exercised were dispositive, as the National Aviation court implies, both types of regulation should have fallen. Instead, the Crotti court focused on the nature of the regulation, i.e., land management v. air space

management.

The second basis for upholding the ordinance was the clear expression of Congressional intent not to "'prevent airport proprietors from excluding any aircraft on the basis of noise considerations.'" (National Aviation v. City of Hayward, Cal., supra, 418 F.Supp. 417, 424, quoting Sen. Rpt. No. 1353, 90th Cong., 2d Sess., 7.)

The result reached in National Aviation v. City of Hayward, Cal., supra, severely undercuts the Burbank decision. Five members of the Supreme Court found the Burbank ordinance incompatible with a perceived need for a uniform and exclusive system of federal aircraft noise regulation. The City of Hayward ordinance seems equally incompatible; yet it was permitted to stand as an exercise of proprietary power.

b. State Law.

Britt adduces several California cases in support of the respondent court's overruling of the demurrers. For diverse reasons, reliance upon these cases is misplaced.

In Loma Portal Civic Club v. American Airlines, Inc., 61 Cal.2d 582, Britt contends, the Supreme Court held that while airlines could not be prohibited from flying, damages could be sought from the airport's owner-operator on a nuisance theory.[4] Although the California Supreme Court did reject the airlines' claim of federal preemption, the short answer to Loma Portal, the Port District retorts, is that the case was decided nine years before Burbank. In rejecting federal preemption the California Court noted:

FOOTNOTE 4: In fact the holding was more narrow. The operator of the field was not a party to the action. The Court stated merely:

> "Nothing herein is intended to be a determination of the rights of landowners who suffer from airplane annoyances to seek damages from the owners or operators of aircraft or to seek compensation from the owner or operator of an airport." (Id. pp. 590-591.)

"A holding of federal preemption would have the effect of disabling the state from any action in the entire field, and placing in the federal government complete and sole responsibility for regulation of all aspects of that field. Such a holding by a single state court would have, of course, no effect on the conduct of other states with respect to regulation of that field, and unless Congress had in fact intended such preclusion of state regulation and were to carry out its responsibilities, there would result within that state a lacuna which the state would be powerless to fill. As was said in Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 505 [82 S. Ct. 519, 7 L.Ed.2d 483], quoting from the opinion of the Massachusetts Supreme Judicial Court: 'In the absence of a clear holding by the Supreme Court of the United States that Federal jurisdiction has been made exclusive, we shall not make what would be tantamount to an abdication of the hitherto undoubted jurisdiction of our own courts.'" (Loma Portal Civic Club v. American Airlines, Inc., 61 Cal.2d 582, 591.)

Nestle v. City of Santa Monica, 6 Cal. 3d 920, Britt notes, was a case brought by hundreds of individual plaintiffs against the City of Santa Monica as operator of the Santa Monica Airport. The plaintiffs were permitted to go

forward on four theories: inverse condemnation, nuisance, negligence and zoning violations. The Port District correctly responds (1) Nestle was decided approximately one year before Burbank, and (2) governmental immunity under state law, and not federal preemption, was at issue.

In City of San Jose v. Superior Court, 12 Cal.3d 447, Britt claims, the Supreme Court noted that a nuisance action can be maintained against a public airport. In fact, the Court nowhere addressed federal preemption in that case and was concerned solely with class action issues. Although San Jose was decided after Burbank, it cannot fairly be said to be, as Britt argues, the "current law of California" on issues not contested.

In Aaron v. City of Los Angeles, 40 Cal.App.3d 471, homeowner plaintiffs successfully sought inverse condemnation damages for harm caused by air traffic at Los Angeles International Airport. The court rejected the City's contention that federal preemption precluded local regulation of airport noise and absolved

the City of responsibility for the interference with plaintiffs' use and enjoyment of their property caused by air traffic. The court noted nothing in Burbank relieved airports of the duty to appropriate necessary land and air easements (id. p. 489; see Griggs v. County of Allegheny, Pennsylvania, supra, 369 U.S. 84 [82 S.Ct. 531]). The Port District accurately replies:

> "What is significant about Aaron is that the case was tried, and discussed on appeal, solely upon an inverse condemnation theory of recovery. The Court of Appeal, commencing at page 487 of its opinion, pointed out that Federal preemption would not obviate the responsibility of the airport operator to compensate private property owners (as required by the Constitution) for any taking of their property for airport operations, citing Griggs v. Allegheny County, supra. That is, of course, consistent with the position which has been taken by the Port District in this petition. Aaron did not discuss the effect of Federal preemption on tort theories of recovery requiring adjudication of airport operational procedures."

CONCLUSION

We conclude the plaintiffs may not recover tort damages from the Port District for harm caused by aircraft in flight. Of the federal decisions which have dealt with the authority of airport proprietors after Burbank, we accept the reasoning of the court in Air Transport Association of America v. Crotti, supra, 389 F. Supp. 58, which distinguished between airport land and facility use (held subject to local regulation) and aircraft in flight (held subject to federal regulation only). To authorize recovery from the proprietor of an airport for injuries caused by aircraft in flight would permit local liability for conduct within exclusive federal control.[5]

FOOTNOTE 5: "'Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls.'" (City of Burbank v. Lockheed Air Terminal Inc., supra, 411 U.S.

(Continued)

It is no rebuttal to this reality to argue that the Port District could reduce or avoid its tort liability by selectively or entirely excluding aircraft from Lindbergh Field. Such regulations to avoid tort liability would have the same deleterious effect on interstate air traffic flow as the Burbank ordinance.[6] In our view, civil damages for

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FOOTNOTE 5 Continued:

624, 633-634 [93 S. Ct. 1854, 1860], quoting Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292, 303 [Jackson, J., concurring].)

FOOTNOTE 6: "If we were to uphold the Burbank ordinance and a significant number of municipalities followed suit, it is obvious that fractionalized control of the time of take-offs and landings would severely limit the flexibility of the FAA in controlling air traffic flow. The difficulties of scheduling flights to avoid congestion and the concomitant decrease in safety would be compounded. In 1960 the FAA rejected a proposed restriction on jet operations at the Los Angeles airport between 10 p.m. and 7 a.m. because such restrictions could 'create critically serious problems to all air transportation patterns.' 25 Fed Reg 1764-1765. The complete FAA statement said:

(Continued)

the noxious by-products of aircraft in flight, like the Burbank ordinance and like the SENEL regulations invalidated

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FOOTNOTE 6 Continued:

> "'The proposed restriction on the use of the airport by jet aircraft between the hours of 10 p.m. and 7 a.m. under certain surface wind conditions has also been reevaluated and this provision has been omitted from the rule. The practice of prohibiting the use of various airports during certain specific hours could create critically serious problems to all air transportation patterns. The network of airports throughout the United States and the constant availability of these airports are essential to the maintenance of a sound air transportation system. The continuing growth of public acceptance of aviation as a major force in passenger transportation and the increasingly significant role of commercial aviation in the nation's economy are accomplishments which cannot be inhibited if the best interest of the public is to be served. It was concluded therefore that the extent of relief from the noise problem which this provision might have achieved would not have compensated the degree of restriction it would have imposed on domestic and foreign Air Commerce.'
>
> "This decision, announced in 1960, remains peculiarly within the

(Continued)

in Crotti, are a form of state regulation in an area which must remain free of such regulation if national air safety, traffic and noise policy are to be left unhampered.

Plaintiffs have not alleged that the flying aircraft about which they complain did not comply with federal laws and regulations. Since federal laws and regulations have preempted local control of aircraft in flight, flights which comply with such laws and regulations may not be classified as negligent, nuisances or trespasses, and the Port District cannot be held liable for tort damages alleged to arise from them. To the extent such

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FOOTNOTE 6 Continued:

> "This decision, announced in 1960, remains peculiarly within the competence of the FAA, supplemented now by the input of the EPA. We are not at liberty to diffuse the powers given by Congress to FAA and EPA by letting the States or municipalities in on the planning. If that change is to be made, Congress alone must do it." (City of Burbank v. Lockheed Air Terminal Inc., supra, 411 U.S. 624, 639-640 [93 S. Ct. 1854, 1862-1863].)

flights may have resulted in the "taking" of their property, plaintiffs are relegated to a recovery of just compensation in inverse condemnation against the Port District (Luedtke v. County of Milwaukee, supra, 521 F.2d 387, 391; see also Griggs v. County of Allegheny, Pennsylvania, supra, 369 U.S. 84 [82 S. Ct. 531].)

However, nothing in the Burbank decision suggests an airport operator is relieved by federal law of the common law duty to act nontortiously as a proprietor. If the Port District has tortiously managed and maintained the facilities at Lindbergh Field to the harm of some or all of the plaintiffs, the action is not precluded by the doctrine of federal preemption.

Since the allegations in the complaint seek recovery for harm caused by proprietary actions and omissions as well as for harm caused by aircraft in flight, they are broad enough to state a cause of action, and the general demurrers at issue were properly overruled. Nevertheless, recovery for tort damages at trial should be limited to those

damages, if any, which arise out of the operation of the airport itself and should not include damages caused by aircraft in flight.

The order to show cause is discharged, and the petition for a peremptory writ is denied.

CERTIFIED FOR PUBLICATION.

Ault
J.

WE CONCUR;

Brown
P.J.

Cologne
J.

APPENDIX B

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

United States Constitution, Article VI, Clause 2:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

42 U.S.C. § 1857h-2(e):

> Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

49 U.S.C. § 1506:

> Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

14 C.F.R. § 36.5:

> Pursuant to 49 U.S.C. 1421(b)(4), the noise levels in this part have been determined to be as low as is economically reasonable, technologically practicable, and appropriate to the type of aircraft to which they apply. No determination is made, under this part, that these noise levels are or should be acceptable or unacceptable for operation at, into, or out of any airport.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-148

ROGER A. BRITT, et al.,

Petitioners,

v.

SAN DIEGO UNIFIED PORT DISTRICT and
SUPERIOR COURT OF THE STATE OF CALIFORNIA,
FOR THE COUNTY OF SAN DIEGO,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JURISDICTION

The Petition for Writ of Certiorari (*Petition*) does not present an issue as to which this Court should exercise its jurisdiction at the present time. As Respondent San Diego Unified Port District (hereinafter "Port District") will discuss *infra*, this Court should not exercise its jurisdiction to consider an interlocutory decision which derives from a proceeding primarily eminent domain in nature where additional proceedings below will require this Court's review of other federal questions at a later date.

QUESTIONS PRESENTED

1. Whether the Court of Appeal correctly ruled that the regulation of aircraft *in flight* for noise abatement purposes is federally preempted, and that the Port District is therefore not liable under state law for harm alleged to arise from the operation of jet aircraft in navigable airspace.

2. Whether this Court should grant a Petition for Writ of Certiorari where no conflict of decisions exists between a court of last resort of a state and one or more United States Courts of Appeals or this Court; or between courts of last resort of two or more states.

3. Whether this Court should grant a Petition for Writ of Certiorari when: (1) The decision below is interlocutory in nature and derives from a proceeding essentially eminent domain in nature; and (2) the underlying actions will require consideration by this Court of other federal questions at a later time.[1/]

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND.

The San Diego Unified Port District ("Port District") is a special district created by the California Legislature in 1963 (San Diego

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1/ Petitioners ask this Court to consider whether tort actions predicated upon airport noise may be brought against the United States of America in Federal District Courts (*Petition* at 3-4). That question has not been briefed, raised or argued below and appears nowhere in the record. Accordingly, this Court should not consider it. *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *Adickes v. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *Lawn v. United States*, 355 U.S. 339, 362-363 n.16 (1958); *Husty v. United States*, 282 U.S. 694, 701-702 (1931); *Duignan v. United States*, 274 U.S. 195, 200 (1927); *Tyrrell v. District of Columbia*, 243 U.S. 1, 4 (1916). Furthermore, this Court does not render advisory opinions. *Flast v. Cohen*, 392 U.S. 83, 96-97 (1968).

Unified Port District Act, Stats.1962, 1st Ex.Sess., c. 67, California Harbors & Navigation Code, Appendix 1, §§1 *et seq.* [West Supp. 1977]) to administer state owned tidelands which previously had been controlled by five local municipalities in the San Diego region. San Diego International Airport - Lindbergh Field ("Lindbergh Field"), San Diego's major commercial air carrier airport, is located on state owned tidelands. Administration of the airport passed to the Port District upon its creation in 1963.

Petitioners here, and plaintiffs in the underlying actions, are residents (and one church) of San Diego, living in an area in proximity to Lindbergh Field. Petitioners have contended that their properties have been taken and damaged and their persons injured as a proximate result of noise and other effects generated by jet aircraft operations at Lindbergh Field.

II. PROCEEDINGS BELOW.

In July, 1975, petitioners filed an action entitled *Britt, et al. v. San Diego Unified Port District*, San Diego Superior Court No. 367963. Later, a similar action, *Banks, et al. v. San Diego Unified Port District*, San Diego Superior Court No. 379755 was filed, and the two actions were consolidated. Originally, 936 individuals and one church were named as plaintiffs. The sole named defendant was the Port District.

In Count 1 of their complaints, petitioners alleged that their property had been taken by the Port District in derogation of their rights under the Just Compensation Clause of the Fifth Amendment to the Constitution of the United States (as incorporated through the Due Process Clause of the Fourteenth Amendment), and Article I, §19 of the California Constitution. Counts 13 and 14 of petitioners' complaints alleged that the Port District was liable to them as third party beneficiaries under contractual agreements between the Port District and the Federal Aviation Administration (FAA) which are commonly known as "grant agreements". Neither the inverse

condemnation count nor the grant agreement counts are at issue here. Both the inverse condemnation and grant agreement theories raise substantial federal questions.

The Port District, however, demurred to the other counts of petitioners' complaints, which sound respectively in nuisance (Counts 3 and 4); negligence (Counts 5 and 6); trespass (Counts 7 and 8); and failure of the Port District to obtain a proper operating permit from the State of California, Department of Transportation, Division of Aeronautics (Counts 9 and 10). The ground of the demurrers was that these actions, based upon California statute,[2/] are not permissible because the field of airport noise regulation has been preempted by the federal government (*City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973)); and that the award of damages by a court is as much a regulation of preempted activity as any injunctive relief or legislative action. *San Diego Bldg. Trades Council v. Garmon,* 359 U.S. 236 (1959).

The Superior Court of the State of California for the County of San Diego overruled the demurrers, and the Port District petitioned the California Court of Appeal, Fourth Appellate District, for its writ to compel the Superior Court to sustain the demurrers. The Court of Appeal ultimately refused to issue its writ in an opinion reported as *San Diego Unified Port Dist. v. Superior Court* (1977) 67 Cal. App.3d 361. The writ was denied because the Court concluded that the tort counts of petitioners' complaints were sufficiently broad to include allegations of tortious conduct by the Port District in respect

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2/ In California, a public entity is liable only as provided by statute and may not be sued on purely "common law" theories of recovery. California Government Code §815; *Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 932.

of management and maintenance of ground facilities at Lindbergh Field. The court, however, instructed the Superior Court that on the trial of the action, it was not to award damages against the Port District on any tort theory of recovery for any harm caused by aircraft in flight because regulation in that field is federally preempted.

Review by the California Supreme Court was denied, and the Petition for Writ of Certiorari to this Court followed.

REASONS FOR DENYING WRIT

I. INTRODUCTION AND SUMMARY.

In holding that the Superior Court of the State of California may not, through the medium of damage awards, regulate the operation of aircraft in flight for noise abatement purposes, the California District Court of Appeal correctly followed the decisions of this Court in *City of Burbank v. Lockheed Air Terminal, Inc., supra; San Diego Bldg. Trades Council v. Garmon, supra;* as well as the decisions in *Luedtke v. County of Milwaukee,* 521 F.2d 387 (7th Cir. 1975), *aff'g in part* and *rev'g in part on other grounds,* 371 F.Supp. 1040 (E.D. Wis. 1974) and *Air Transport Association of America v. Crotti,* 389 F.Supp. 58 (N.D. Cal. 1975). In *Burbank,* this Court held that the preemptive scope of the Federal Aviation Act of 1958 (49 U.S.C. §§1301 *et seq.*, as amended) evidenced an intent by Congress to establish a uniform and exclusive scheme of federal regulation of aircraft in flight for noise abatement purposes. It was the view of this Court that the comprehensive scheme of federal regulation of aircraft and airport noise left "no room for local curfews or other local controls." 411 U.S. at 638.

Petitioners argue that in footnote 14 to the *Burbank* decision, this Court exempted local proprietors of airports from this preemptive effect. Since their actions are against a proprietor, they suggest that *Burbank* is inapplicable to the proceedings in this case. The issue here,

however, is *not* the power of the Port District, in its capacity as a proprietor of an airport, to regulate for noise abatement purposes. The issue presented by the Port District in the proceedings below is whether or not the Superior Court, a local governmental agency which is not a proprietor of an airport, may regulate operation of an airport for noise abatement purposes through the medium of damage awards. The clear answer of *Burbank* and *Garmon* is that the Superior Court cannot play such a role in the formulation of the nation's airport and aircraft noise policy.

Not only is the decision of the Court of Appeal consistent with the existing federal case law concerning this issue, but it is also consistent with the views of the responsible regulatory agencies. Much of petitioners' argument is based upon FAA's recent statement of policy regarding airport noise as expressed in the *Aviation Noise Abatement Policy* (November 18, 1976) (*Noise Policy*). Petitioners quote selectively from general statements in the *Noise Policy* to suggest that FAA has rejected its preemptive authority in the field of aircraft noise control, and that the FAA policy statement authorizes their tort actions against an airport proprietor.

In fact, the views of FAA regarding the division of authority and responsibility between the federal government on the one hand, and proprietors on the other, are virtually identical to the division of authority as defined by the Court of Appeal in the opinion below. Both FAA and the Court of Appeal reaffirm the long established principle that the federal government has sole regulatory authority for controlling the operation of aircraft in flight for noise abatement purposes. The *Noise Policy* not only fails to delegate that authority to local proprietors; it makes it unequivocally clear that FAA will not share its responsibility for aircraft operational control with any state or local agency.

Finally, petitioners rely upon the "savings clause" of the Federal Aviation Act, 49 U.S.C. §1506, as authority for maintenance of their state law causes of action against the Port District. Nevertheless, in

both *Burbank* and other decisions, this Court has held that general savings clause provisions such as that contained in the Federal Aviation Act will not be interpreted in such a way as to frustrate and defeat Congressional purposes and objectives reflected in the more specific provisions of Congressional legislation. To interpret the savings clause as petitioners suggest would totally defeat the Congressional objective of a uniform and exclusive system of federal regulation of aircraft in flight. This Court previously has made it clear that such a result cannot be permitted.

II. THE CALIFORNIA DISTRICT COURT OF APPEAL CORRECTLY DECIDED THIS CASE.

A. The Issue Presented is the Power of a Non-Proprietor Local Governmental Entity to Regulate Aircraft in Flight for Noise Abatement Purposes. The Court of Appeal Correctly Decided that Local Agencies Which Are Not Proprietors Have No Such Authority.

In *City of Burbank v. Lockheed Air Terminal, Inc., supra,* this Court held that the "delicate balance" required by the Federal Aviation Act between the interdependent considerations of safety, efficiency in airspace management and aircraft noise control, mandated "a uniform and exclusive system of federal regulation if the congressional objectives underlying the Federal Aviation Act are to be fulfilled." 411 U.S. at 638, 639. Although recognizing that control of noise is deep-seated in the police power of the states, this Congressionally mandated uniform and exclusive system for regulating the nation's airways and aircraft resulted in the Court's conclusion that "the pervasive control vested in EPA and FAA under the 1972 [Noise Control] Act seems to us to leave no room for local curfews *or other local controls.*" 411 U.S. at 638 (emphasis added).

While *Burbank* involved a curfew ordinance adopted by the City of Burbank, it is well established that civil damage actions can result

in regulation of federally preempted activity as impermissible as a local injunction or legislative activity. Regarding a California damage action held to be preempted by federal labor legislation, this Court stated in *San Diego Bldg. Trades Council v. Garmon, supra*:

> "Our concern is with delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered. Such regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy. Even the States' salutory effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme [citation omitted]. It may be that an award of damages in a particular situation will not, in fact, conflict with the active assertion of federal authority. The same may be true of the incidence of a particular state injunction. To sanction either involves a conflict with federal policy in that it involves allowing two law-making sources to govern."
> 359 U.S. at 246-247.

This principle has often been reaffirmed. *E.g., Motor Coach Employees v. Lockridge*, 403 U.S. 274, 286-292 (1971); *Iron Workers v. Perko*, 373 U.S. 701, 705-706 (1963); and *Plumbers' Union v. Borden*, 373 U.S. 690, 693-694 (1963).[3/]

3/ Petitioners analogize this case to the decision last term in *Farmer v. United Brotherhood of Carpenters*, 97 S.Ct. 1056 (1977), contending that *Farmer* held that the National Labor Relations Act did not preempt the right of a union member to sue a union in state court for tortious conduct. They (footnote continued on next page)

Burbank and *Garmon*, read together, make it clear that tort theories of recovery against the proprietor of an airport for harm caused by aircraft in flight would present an impermissible threat of local regulation in the federally preempted field of aircraft flight operations; and that such actions would therefore violate the Supremacy Clause of the Constitution of the United States.

(footnote continued from previous page)

claim that *Farmer* "emphasized the state's interest in protecting its citizens from tortious injury, and the concurrent lack of Federal interest in protecting tortious conduct" (*Petition* at 17-18).

The holding of *Farmer*, of course, is much more narrow. *Farmer* reaffirms the general rule in *Garmon* (97 S.Ct. at 1061) but also recognizes that there are certain exceptions to the *Garmon* rule as, for example, where the activity "'was a merely peripheral concern of the Labor Management Relations Act'." *Id.* The decision in *Farmer* was premised upon the determination that the underlying action involved "violent tortious activity" and that the federal labor statutes do not protect or immunize from state action "violence or the threat of violence in a labor dispute". *Id.* at 1063. The Court noted that the complaint in the underlying action alleged "'outrageous conduct, threats, intimidation, and words'" (*Id.* at 1064); and the Court emphasized that "[r]ecovery for the tort of emotional distress under California law requires proof that the defendant intentionally engaged in outrageous conduct causing the plaintiff to sustain mental distress." *Id.* at 1066. While concluding that Congress did not intend to preclude state actions for intentionally violent torts, the Court "reiterate[d] that concurrent state court jurisdiction cannot be permitted where there is a realistic threat of interference with the federal regulatory scheme." *Id.*

The underlying actions in this case do not involve torts requiring a finding of "outrageous" or "intentional" conduct. Further, *Burbank* makes it inescapably clear that adjudication of issues regarding the regulation of aircraft in flight for noise abatement purposes would present a "realistic threat of interference with the [exclusive] federal regulatory scheme."

In *Luedtke v. County of Milwaukee, supra,* a post-*Burbank* case directly on point with the issue presented here, the Seventh Circuit Court of Appeals reached that very conclusion, holding:

> "Since the federal laws and regulations have preempted local control of aircraft flights, *Burbank, supra,* the defendants may not, to the extent they comply with such federal laws and regulations, be charged with negligence or creating a nuisance. Similarly, §114.04 of the Wisconsin Statutes cannot be invoked to make unlawful flights which are in accordance with federal laws and regulations. If, as the plaintiffs allege, the aircraft flights have resulted in the 'taking' of their property, the plaintiffs have actions at law to recover just compensation from the County. *Griggs, supra;* Section III, *supra.* To the extent that the County [proprietor] may be violating the federal laws or regulations, the plaintiffs should, as explained in Section V, supra, exhaust their administrative remedies."
> 521 F.2d at 391.4/

4/

Petitioners seek to create the impression that the decision of the California District Court of Appeal is somehow "unique" (*Petition* at 12-13 and 31-35). Not only is that not true with respect to the cases which petitioners did cite, but they are able to attempt to create that impression only by failing to cite or otherwise advise this Court of the existence of *Luedtke. Luedtke* is directly on point, and the Port District has consistently relied upon *Luedtke* as being a correct statement of the application of *Burbank* to civil tort actions. The Court of Appeal devoted over two pages of its opinion to a discussion of *Luedtke* (67 Cal.App.3d at 369-371), and it is, we believe, revealing that petitioners find that the only way in which they can deal with *Luedtke* is to ignore the case totally.

Other federal courts dealing with airport damage actions have expressed similar views. In *Virginians for Dulles v. Volpe,* 344 F.Supp. 573 (E.D. Va. 1972), *aff'd in part* and *rev'd in part on other grounds,* 541 F.2d 442 (4th Cir. 1976), the court presaged both *Burbank* and *Luedtke* in denying plaintiffs' damage actions by stating:

> "Moreover, there are other obstacles to relief for the plaintiffs. If, as the Supreme Court has said, albeit by dicta, in Washington v. General Motors Corp. [406 U.S. 109 (1972)], and Illinois v. City of Milwaukee [406 U.S. 91 (1972)], federal regulations and laws have preempted the federal common law of nuisance so far as *emissions* from airplanes are concerned, the regulations and laws are at least as pervasive in the field of aircraft *noise.* 49 U.S.C. §1431, 14 CFR Part 36."
> 344 F.Supp. at 579.

On appeal the Fourth Circuit Court of Appeals held that the damage issue had not been properly preserved for appeal (541 F.2d at 444), but the court did note that the trial court had excluded evidence on aircraft emissions because of federal preemption of that field. *Id.* Implying that the noise issue could have been dealt with in a similar fashion, the court then stated:

> "The district court wrote before the Supreme Court decided *Burbank v. Lockheed Air Terminal, Inc.,* 411 U.S. 624, 93 S.Ct. 1854, 36 L.Ed.2d 547 (1973), which deals with the federal preemption of local and state regulation of aircraft noise."
> 541 F.2d at 444 n.1.

Thus, all of the federal courts which have faced the issue of applying *Burbank* to civil tort actions have reached the same conclusion: Such actions are not permissible absent an allegation that some relevant federal statute has been violated by the defendant. If the opinion of the Court of Appeal is in any sense "unique", it is

only because the Court of Appeal, in leaving the proprietor with potential tort liability for ground activities, did not go as far as the federal courts in barring such actions.

The core of petitioners' argument is summarized at page 29 of their petition where they state that the Port District "fervently" argued to the Court of Appeal - and that the Court of Appeal accepted - that *Burbank* "held that airport operators can exert no control over jet noise." Their contention is that the Port District premises its position upon the argument that airport proprietors have *no* residual authority to regulate in this field. It is difficult to characterize that argument as anything less than an intentional misrepresentation to this Court.

The Port District has consistently taken the position that FAA is the sole regulatory authority for the operation of jet aircraft in flight. Neither the proprietor nor anyone else, we believe, can require aircraft to utilize approach or departure procedures or other flight operational procedures which are contrary to the complicated, detailed and express regulations of FAA which now govern such operations (See, *e.g.*, 14 C.F.R. Parts 71, 73, 75, 77, 91, 93, 95 and 97). The Port District has also taken the position that *Burbank* holds that local or state governmental entities who are not proprietors (including the judiciary) have no residual authority to regulate noise at the nation's airports.[5/]

5/ Obviously, with the caveat that local municipalities do retain the authority to engage in land use planning activities in areas adjacent to airports. The Port District, however, is a special district of limited jurisdiction, and it does not have jurisdiction over the zoning of residential areas in proximity to Lindbergh Field. The responsibility for the utilization of land use planning techniques as a noise abatement strategy in San Diego rests with the City of San Diego.

Nevertheless, the Port District has always recognized that this Court expressly declined to decide in *Burbank* what residual regulatory authority, if any, might remain in airport proprietors. 411 U.S. at 635-636 n.14. The Port District has also acknowledged that proprietors may, under the current state of the law, have some residual authority to regulate in this field not available to non-proprietors.

The basis for the view that the proprietor *may* have some residual regulatory authority is the decision of this Court in *Griggs v. Allegheny County*, 369 U.S. 84 (1962). Decided at the dawn of the commercial jet age in the United States, *Griggs* holds that where a private property owner complains that his property has been taken by virtue of the noise generated by jet aircraft operations at a recently constructed airport, it is the airport operator and not the federal government or the airlines who must meet the constitutional obligation of paying "just compensation" to the property owner. So long as *Griggs* remains the law in the United States, then it is reasonable to assume that proprietors may have at least some correlative authority by which they can mitigate their potential inverse condemnation liability.[6/]

But the principle that proprietors have responsibility for the acquisition of the "approaches" necessary to operate the airport is

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6/ Because of the existence of *Griggs*, the Port District did not demur to petitioners' inverse condemnation count on preemption grounds. (The opinion of the Court of Appeal is in error where it states that we did not "contest the overruling" of our demurrer to the inverse condemnation count [67 Cal.App.3d at 364]. In fact, our demurrer to that count was on other grounds and was sustained with leave to amend. The court is essentially correct, however, in that we did not present the *Griggs* issue to it and sought its writ only with respect to the tort counts of petitioners' complaints). Nevertheless, the Port District has raised preemption as a defense to the inverse condemnation count in its answer to petitioners' complaints; and the Port District contemplates establishing a record on the trial of the actions to form a basis upon which it will ultimately ask this Court to reconsider *Griggs*.

not authority for the proposition that this Court intended by *Griggs* to make proprietors responsible for the "reasonableness" or "unreasonableness" of the procedures under which aircraft in flight operate in navigable airspace.[7/] The thrust of petitioners' argument is that proprietors are exempt from *all* preemption in this field. They then expand that misconception by arguing that because the proprietor may regulate, it can be *commanded* to exercise its authority by another non-proprietor state agency - in this case the Superior Court of the State of California. In rejecting that very argument, an Illinois court recently noted in *Village of Bensenville v. City of Chicago,* 16 Ill.App.3d 773 (1973):

> "As above indicated, despite language relating to the expansion of runways and supporting facilities, the real thrust of the plaintiffs' complaint is to prohibit (by a 'Tinker to Evers to Chance' combination of a court decree upon the [proprietor] to control the airlines) aircraft from producing noise or emitting fumes (while in flight over their territorial boundaries) in excess of certain limits to be fixed by the Illinois Chancery Court."
> 16 Ill.App.3d at 735.

Thus, while a proprietor *may choose* (because of its potential *Griggs* liability) not to allow additional flights which would require it to purchase additional easements, it is clear that the proprietor cannot be *commanded* to do so by a non-proprietor state or local agency. It makes no difference whether that command takes the form of legislative direction or direction by a judicial officer using the court's power either to issue an injunction or award substantial money damages. Either course is, as this Court recognized in *Garmon,* calculated to make policy and to regulate conduct.

7/ "Navigable airspace" is a defined term under 49 U.S.C. §1301(26).

The key holding of *Burbank* concerning the authority of non-proprietors is that they "'remain unable to use their police powers to control aircraft noise by regulating the flight of aircraft.'" 411 U.S. at 635. The Superior Court of the State of California is not a proprietor of an airport, and it may not command the Port District, as a proprietor, in a manner which would regulate the operation of aircraft in flight. If it were permissible for either a state or local legislative or judicial body to command a proprietor to use "proprietor's powers" (if any) to regulate the operation of aircraft at the airport, then *Burbank* would mean nothing. We do not believe that this Court intended that to be the effect of its decision. The *Burbank* ordinance was nothing more than a direction to a proprietor by the City of Burbank regarding an airport located within the city's jurisdiction to prevent jet aircraft from using the airport between the hours of 11:00 p.m. and 7:00 a.m. It was a command by a non-proprietor local agency to a proprietor seeking to regulate operations at the airport, and the ordinance was held unconstitutional. Adjudication of the tort counts of the petitioners' actions, and an award of damages under any of those theories of recovery, is similarly and inescapably a command by a non-proprietor local authority to a proprietor regulating and controlling operations at the airport; and it is similarly and inescapably unconstitutional.

If, as they state, petitioners truly find it "hard to understand" how the Court of Appeal characterized as correct the conclusion that federal preemption of this field leaves no room for local controls, including civil tort actions for money damages (*Petition* at 11), then it can only be that they have not read *Burbank,* that they have not read *Garmon,* and that they have not read *Luedtke* or the other authorities to which they casually refer throughout their petition.[8/]

8/ For example, the detailed analysis by the Court of Appeal of *Air Transport Association of America v. Crotti, supra,* (67 Cal.App.3d at 371-373)

(footnote continued on next page)

The Court of Appeal's holding is neither "erroneous" nor "self-abnegating" (*Petition* at 35). The conclusion of the Court of Appeal is not only consistent with prior decisions of the federal courts on this issue of federal constitutional law - its conclusion was compelled by those decisions.

B. The FAA's Aviation Noise Abatement Policy Supports the Conclusion Reached by the Court of Appeal. In Fact, the Views of FAA and the Court of Appeal on this Issue are Virtually Identical.

Petitioners' argument relies heavily upon a recent policy statement of the Federal Aviation Administration (FAA) entitled *Aviation Noise Abatement Policy* (November 18, 1976) (*Noise Policy*). Quoting FAA as stating that it has rejected "full and complete federal preemption of the field of aviation noise abatement" (*Petition* at 10), petitioners suggest that FAA is at odds with the Court of Appeal concerning the proper division of legal authority and responsibility between the federal government on the one hand, and state and local governments (including proprietors) on the other hand. A less superficial view of the *Noise Policy*, however, reveals that the views of FAA and the Court of Appeal regarding this division of authority and responsibility are virtually identical.

While FAA may have declined for the present to exercise "fully" and "completely" its Congresionally mandated responsibility to preempt the entire field of airport noise control, the *Noise Policy* clearly reaffirms *total* federal preemption of the regulation of aircraft

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stands in stark contrast to the contention by petitioners that the Court of Appeal "*expressly* chose to disregard" the case (*Petition* at 12). Indeed, the Court of Appeal based its conclusion primarily upon the division of authority and responsibility defined in *Crotti* (67 Cal.App.3d at 376).

in flight for noise abatement purposes. In the introduction to the *Noise Policy*, the Federal Aviation Administrator and the Secretary of Transportation recognize "the responsibility of the federal government to reduce aircraft noise at its source", while assigning to local governments and airport proprietors the duty to "acquire land and assure compatible land use in areas surrounding the airport." *Noise Policy* at 2, 3. At pages 5 and 6 of the *Noise Policy*, FAA summarizes its views regarding the respective responsibility of the various parties involved in airport noise control, and it defines the scope of federal authority as follows:

> "*The Federal Government* has the authority and responsibility to control aircraft noise by the regulation of source [aircraft] emissions, by flight operational procedures, and by management of the air traffic control system and navigable airspace in ways that minimize noise impact on residential areas, consistent with the highest standards of safety."
>
> *Noise Policy* at 5.

And, in discussing the "Legal Framework" of its policy, the FAA states: "In legal terms the federal government, through this exercise of its constitutional and statutory powers, has preempted the areas of airspace use and management, air traffic control and aviation safety." *Noise Policy* at 29. The *Noise Policy* also describes past and proposed federal action with respect to noise source (aircraft) regulation (*Noise Policy* at 35-44), together with a history and description of actions considered both by FAA and the Environmental Protection Agency (EPA) in regulating aircraft operational procedures (*Noise Policy* at 44-47).

Particular actions which FAA believes proprietors can take in respect of noise abatement are also described at pages 55 through 57 of the *Noise Policy*. Almost all of those actions deal with such matters

as land acquisition and noise abatement procedures on the ground. None authorize direct proprietor regulation of aircraft in flight.[9]/

The FAA's view that it has preemptive responsibility for controlling aviation noise at its source,[10]/ while local governments and proprietors are responsible for ground related activities such as land use planning to achieve airport-compatible land use in surrounding areas, equates precisely with the dichotomy of legal responsibility defined by the Court of Appeal. The *Noise Policy* nowhere suggests that FAA has abdicated to local proprietors the authority to regulate aircraft in flight for noise abatement purposes. Rather, the *Noise Policy* reaffirms in unqualified terms FAA's intent to retain exclusive regulatory authority in that field. Far from serving as a basis for reexamination of the decision of the Court of Appeal, the *Noise Policy* is additional authority for the conclusion that the opinion of the Court of Appeal is correct.

The *Noise Policy* does suggest that proprietors may *propose* airport use restrictions to FAA.[11]/ However, FAA continues in its view that

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9/ While the *Noise Policy* does describe actions which FAA believes can be taken by an airport proprietor, the *Noise Policy* distinguishes between those activities which the proprietor "can implement directly" (land use activities) and those which the proprietor "can propose to FAA for implementation" (regulation of aircraft in flight). *Noise Policy* at 55-57.

10/ "Controlling aircraft noise at its source" is a phrase of art used by FAA to describe regulation of jet aircraft construction and flight operations. *See, e.g.,* the discussion at pages 22, 23, and 43-47 of the *Noise Policy*.

11/ "Airport use restrictions" would include: (1) "Time" restrictions such as the curfew dealt with by this Court in *Burbank*; (2) "type" restrictions excluding certain aircraft from the airport because of their noise characteristics; or (3) a combination of time and type restrictions.

> "[w]hile the airport proprietor is best situated to judge the local noise problem and to determine how to respond to it, he is not always in the best position to judge the impact of his noise reduction proposal on the national and international air transportation systems. Because of the intricacy of those systems, use restrictions at a single airport, under certain circumstances, could cause wide-spread disruption throughout those systems."
> *Noise Policy* at 58.

Recognizing that it "has the obligation to assure that proprietor actions to meet local needs do not conflict with national and international purposes" (*Id.*), FAA requires that a proprietor considering a "use restriction" as a tactic for noise abatement submit the proposal in advance to FAA with: (1) A full description of alternative noise abatement techniques; and (2) a statement of the proprietor's reason for adoption of a use restriction rather than other noise abatement alternatives. The FAA requires prior submission so that it can "ensure that uncoordinated and unilateral restrictions at various individual airports do not work separately or in combination to create an undue burden on interstate or foreign commerce, unjustly discriminate or conflict with FAA's statutory regulatory authority" (*Noise Policy* at 59); and FAA characterizes this prior review of proposed use restrictions as "vital". *Id.* Proprietor adopted use restrictions not approved in advance will not be recognized by FAA as valid, and a proprietor adopting a use restriction without prior FAA approval may expect to be a defendant in litigation initiated by the United States. *Noise Policy* at 59-60.

The FAA thus reaffirms the conclusion in *Burbank* that evaluation of use restrictions remains "peculiarly within the competence of FAA, supplemented now by the input of EPA"; and that only further Congressional action will allow "the States or municipalities in on the planning." 411 U.S. at 640. While FAA may have now invited proprietor participation in this planning process, there is no

such invitation in the *Noise Policy* to non-proprietors such as the Superior Court of the State of California.

Nevertheless, petitioners' argument regarding use restrictions is:

> "Thus, contrary to the Court of Appeal's conclusion, the FAA believes that '. . . the reasonableness of the operation of airports . . .' (67 Cal.App.3d at 369) *is* subject to examination. How else could one determine whether discrimination is 'unjust', or interference with commerce is 'unreasonable'?"
> *Petition* at 27.

This argument implies that petitioners should be permitted to pursue their tort actions by contending that the Port District should have adopted some use restriction which would have reduced their "damage" while not unjustly discriminating against users, or imposing an unreasonable burden on interstate commerce. The further implication of the argument is that FAA approves adjudication of those questions by individual trial courts.

However, the *Noise Policy* not only fails to approve such action by individual state courts, it is clear that FAA would find such a situation intolerable. The whole purpose of FAA's insistence upon prior FAA review and approval of use restrictions is that such restrictions will affect the integrated national air transportation system, and that FAA is the only authority which can accurately evaluate the total impact of a use restriction at a particular airport. Adjudication of petitioners' actions would require an evaluation of whether or not particular use restrictions proposed by petitioners would unjustly discriminate against users or unreasonably burden interstate commerce. Such an action would necessarily require evidence on every facet of the commercial air transportation system, and it would take many months - perhaps years - to try. This lengthy trial would then result only in the views of one local court on the "reasonableness" of particular use restrictions. If one local trial

court can make such a determination, then trial courts in all 50 states may do the same. The possibility, indeed probability of conflicting and inconsistent decisions is substantial. The resulting impact on maintenance of a uniform and coordinated national air transportation system is obvious - it would no longer be possible.

It is nothing more than fantasy to suggest that FAA has ever intended that individual state courts should actively participate in adjudicating the delicate balance between airspace safety, efficiency, management and the control of aircraft noise. On announcing hearings preparatory to formulation of its *Noise Policy*, the FAA stated:

> "The question of airport noise has been the subject of extensive litigation in the context of very specific and somewhat circumscribed issues being presented to the Courts in a limited factual context. The FAA does not believe that policy in this area should be the result or product of piecemeal judicial decisions. The FAA believes its role is to develop policy in a manner which, to the maximum extent possible, eliminates potential conflicts and accomodates the varying and competing interstate and local multijurisdictional interests."
> 40 *Fed. Reg.* 28844.

Finally, those portions of the *Noise Policy* relied on by petitioners are not even relevant to the true issue before this Court. As noted earlier, the issue in this case is the power of a *non-proprietor* to regulate in the field of aircraft noise abatement. The views of FAA on the authority of non-proprietor local agencies is that "[t]he scope of their authority has been most clearly described in negative terms", and that their remaining authority in the field is limited solely to land use controls. *Noise Policy* at 31-32. Since the Superior Court of the State of California is in the class of local entities which do not own airports, the *Noise Policy* again supports the conclusion reached by the

Court of Appeal that the Superior Court has no role in the regulation of aircraft in flight for noise abatement purposes.

C. The "Savings Clause" of the Federal Aviation Act Has Not Been and Cannot Be Interpreted in a Manner Which Would Permit Petitioners' Tort Counts.

As recently as last term, this Court reaffirmed in *Jones v. Rath Packing Co.*, 97 S.Ct. 1305 (1977), that where Congress has "'unmistakably . . . ordained'" that its enactments are to be the sole regulation of an area of commerce, state laws regulating that aspect of commerce are unconstitutional and impermissible. *Id.* at 1309. While this result may be compelled by an express Congressional command explicitly stated in the language of the statute, *Jones* recognized that the Congressional command of preemption may also be "implicitly contained in [the statute's] structure and purpose." *Id.* (Citing to *Burbank*). Under those circumstances, the issue then becomes whether or not the state's "'law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.*

It was after an extensive review of the legislative history of the relevant statutes that this Court concluded in *Burbank* that the federal government had preempted the field of airport noise control. 411 U.S. at 633. The Congressional goals and objectives identified in that process included the need for a centralized federal authority to maintain the "delicate balance" between airspace safety and efficiency, protection of persons on the ground, as well as the control of noise pollution. *Id.* at 638-639. The Court reaffirmed that local governmental entities cannot regulate in this area so long as the Congress requires federally directed uniformity. Quoting part of the legislative history of relevant amendments to the Federal Aviation Act, the Court noted:

> "'The courts have held that the Federal Government presently preempts the field of noise regulation insofar as it involves *controlling the flight of aircraft*. . . . HR 3400 would merely expand the Federal Government's role in a field already preempted. It would not change this preemption. State and local governments will remain unable to use their police powers to control aircraft noise by regulating the flight of aircraft.'"
> 411 U.S. at 635 (emphasis added).

Petitioners seek to escape the inevitable conclusion that their tort counts may not serve as the basis for local regulation of aircraft in flight by contending that, while the Superior Court may not be permitted to regulate the operation of aircraft in flight, it is permitted to regulate the consequences of such operations. In so arguing, they rely upon the "savings clause" of the Federal Aviation Act (49 U.S.C. §1506).[12/]

12/ Petitioners also briefly mention provisions of the Airport and Airway Development Act of 1970 (49 U.S.C. §§1701-1742) as support for their private damage actions (*Petition* at 16). Provisions of the Airport and Airway Development Act are the basis for the "grant agreement" counts of petitioners' complaints in the underlying actions (Counts 13 and 14). While not conceding the validity of those causes of action, the Port District has never demurred to them, and they have never been part of the record in the courts below with respect to the preemption issue now presented to this Court. Regardless of the merits of their grant agreement theories, there is nothing in the Airport and Airway Development Act which even remotely authorizes petitioners' tort counts.

Petitioners also mention the Clean Air Amendments of 1970, 42 U.S.C. §§1857 *et seq.* They note that §1857h-2(e) permits exercise of any rights under statute or common law "to seek enforcement of any emission

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One commentator, analyzing savings clause arguments on federal preemption questions, has characterized them as "makeweight arguments" and has suggested that "neither the presence nor the absence of a savings or exclusiveness provision is alone sufficient to resolve a pre-emption question." Note, *Pre-emption as a Preferential Ground: A New Canon of Construction,* 12 Stan.L.Rev. 208, 214-215 (1959). Savings clauses are always interpreted in the context of the more specific provisions of the related legislation.

In *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.,* 204 U.S. 426 (1907), this Court held that the Congressional purpose underlying the Interstate Commerce Act was to eliminate discrimination by creating uniform shipping rates to be regulated by the Interstate Commerce Commission. 204 U.S. at 439. Given that purpose, the Court held that a savings clause in the Act identical to that present in the Federal Aviation Act would not permit a private damage action attacking the reasonableness of rates which were subject to the jurisdiction of the federal agency (204 U.S. at 446-447) because, the Court concluded, "the act cannot be held to destroy itself." *Id.* at 446.

The courts have applied the reasoning of *Abilene* to other private damage actions relying upon the presence of a savings clause. In *Danna v. Air France,* 334 F.Supp. 52 (S.D.N.Y. 1971), *aff'd,* 463 F.2d 407 (2d Cir. 1972), members of a purported class charged that numerous airlines maintained a "Youth Fare" ticket pricing structure which

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standard or limitation or to seek any other relief. . ." Nevertheless, this Court has already determined the Clean Air Amendments to be preemptive in scope (*Washington v. General Motors Corp.,* 406 U.S. 109, 114-115 (1972); *See also, Virginians for Dulles v. Volpe, supra,* 344 F.Supp. at 579). In any case, petitioners have never alleged in any count of the underlying actions that the Port District has violated any regulatory "emission standard or limitation" in the operation of Lindbergh Field.

discriminated against persons older than twenty-five years in violation of Section 404(b) of the Federal Aviation Act (49 U.S.C. §1374(b)). The court held that the issue of discriminatory rates was not a proper subject for judicial inquiry and dismissed the action under the doctrine of primary jurisdiction (of the Civil Aeronautics Board).[13/] Examining the very "savings clause" upon which petitioners rely, the court concluded:

> "It is not likely that the Congress would legislate a scheme under Federal agency aegis, aiming at uniformity, and at the same time permit the survival of State common law rights inconsistent therewith. That was the holding in Texas & Pac. Ry. v. Abilene Cotton Oil Co., *supra,* where it was determined that a shipper could not sue a railroad carrier for an allegedly unreasonable charge based on filed tariffs, *because the common law right was extinguished,* as

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13/ Petitioners suggest that a similar case, *Nader v. Allegheny Airlines, Inc.,* 426 U.S. 290 (1976) authorized "common law actions in areas subject to exclusive federal (CAB) regulation." *Petition* at 17. *Nader* was basically a primary jurisdiction case. Its holding regarding the savings clause was premised upon the fact that the CAB had not, to that point, regulated in the area of airline "over-booking" (426 U.S. at 297 n.8), and that the particular language of Section 411 of the Act did not carry with it the "power to immunize". 426 U.S. at 301. Under those circumstances, the Court determined that a private damage action for overbooking would not require the trial court to "substitute its judgment" for that of the CAB. 426 U.S. at 299-300.

Nader is, therefore, readily distinguishable from the circumstances here since: (1) The FAA has adopted extensive regulations regarding aircraft in flight - including regulations adopted for noise abatement purposes; and, therefore, (2) petitioners' tort counts would require the trial court in this case to "substitute its judgment" for that of FAA regarding the regulation of aircraft in flight for noise abatement purposes.

> absolutely inconsistent with the scheme of the Interstate Commerce Act. It should be noted that the 'saving' provision in the ICA as it then stood was virtually *in haec verba* the language later adopted by the Congress in the 'saving clause' of the Federal Aviation Act of 1958. *It is clear, therefore, that the Act of 1958 had engrafted on to it, at least presumptively, the gloss of* Abilene *with which the Congress was familiar.*"
> 334 F.Supp. at 59 (emphasis added).

See also *T.I.M.E. Inc. v. United States,* 359 U.S. 464, 474 (1959) (this Court will not assume that the Congress was unaware of *Abilene, supra,* in drafting a similar "savings clause").

Further, this Court, the District Court (*Lockheed Air Terminal, Inc. v. City of Burbank,* 318 F.Supp. 914 (C.D. Cal. 1970)) and the Ninth Circuit Court of Appeals all agreed in *Burbank* that there had been a Congressional intent, as in *Abilene,* to impose a *uniform* scheme of federal regulation. Each court also concluded that the savings clause of the Federal Aviation Act could not be interpreted in a way which would frustrate the otherwise expressly stated Congressional objectives and goals in the Federal Aviation Act and related airport noise legislation. In its opinion in *Lockheed Air Terminal, Inc. v. City of Burbank,* 457 F.2d 667 (9th Cir. 1972), the United States Court of Appeals for the Ninth Circuit stated:

> "The State also points out that the Federal Aviation Act contains a 'saving clause,' 49 U.S.C. §1506, a reservation of common law and statutory remedies, indicating that Congress did not intend to preempt state and local regulatory authority.
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> 'Of course such a general provision does not resolve specific problems, Arrow Transportation Co. v. Southern R. Co., 372 U.S. 658, 671, n. 22 [83 S.Ct. 984, 991, 10 L.Ed.2d 52], but its inclusion in the

> statute plainly is inconsistent with congressional displacement of the state statute unless a finding of that meaning is unavoidable.' Head v. New Mexico Board of Examiners, 374 U.S. 424, 444, 83 S.Ct. 1759, 10 L.Ed.2d 983 (1963) (concurring opinion).
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> "In this case, we have found the conclusion of federal preemption 'unavoidable.' Furthermore, the Federal Aviation Act also contains language of exclusivity. 49 U.S.C. §1508 declares that the United States possesses and exercises 'complete and exclusive national sovereignty in the airspace of the United States. . . .' That is the same type of expression which the Supreme Court found in the Federal Tobacco Inspection Act to evidence Congressional intent to establish a wholly federal system which States were powerless even to supplement. Campbell v. Hussey, 368 U.S. 297, 82 S.Ct. 327, 7 L.Ed.2d 299 (1961)."
> 457 F.2d at 675.

In this Court's opinion in *Burbank,* it was the exclusivity language of 49 U.S.C. §1508 which was found to be of paramount importance. 411 U.S. at 626-627.

The true thrust of petitioners' argument in this regard is summarized at page 17 of their petition where they state: "Thus, assuming *arguendo* that Congress had an intent that local *regulation* be 'pre-empted', private *actions for damages are permitted* for any adverse consequences of the regulated activity." (Petitioners' emphasis). The inherent sophistry of this argument was recognized long ago in the often quoted opinion by Judge Dooling in *American Airlines, Inc. v. Town of Hempstead,* 272 F.Supp. 226 (E.D.N.Y. 1967), *aff'd,* 398 F.2d 369 (2d Cir. 1968), *cert. denied,* 393 U.S. 1017. In that case, Judge Dooling noted:

> "Local initiative in noise control of aviation is inherently an effort to regulate a consequence while disclaiming regulation of the cause. It cannot coexist with a comprehensive system of federal regulation of aircraft manufacture (through certificates of airworthiness) and federal regulation of air navigation and air traffic [citations omitted]."
> 272 F.Supp. at 235.

Regulation of the "consequence" *is* regulation of the cause. If individual state courts are permitted to place the intricate system of federal regulation of aviation under local control by adjudicating the "reasonableness" of aircraft flight operations, and then to place their policy determinations into effect through the award of money damages, the Congressional objective of a uniform and exclusive system of federal control of aircraft for noise abatement purposes will not only be frustrated, it will be defeated. The savings clause of the Federal Aviation Act cannot be applied in a way which would preclude accomplishment of the Congressional objective of a uniform federal solution to the national airport noise problem.

III. THE PETITION SHOULD BE DENIED BECAUSE REVIEW IS UNWARRANTED AND UNTIMELY.

A. There Is No Conflict Between a Decision of the Highest Court of a State and a United States Court of Appeals or This Court Regarding a Matter of Federal Law. Nor Is There a Conflict Between the Courts of Last Resort of Two or More States.

As noted earlier, the opinion of the District Court of Appeal is consistent with the holding of the United States Court of Appeals for the Seventh Circuit in *Luedtke v. County of Milwaukee, supra.* Both *Luedtke* and the opinion of the California District Court of Appeal rely upon and are consistent with *City of Burbank v. Lockheed Air Terminal, Inc., supra.* Therefore, even assuming, *arguendo,* that this

Court should exercise its jurisdiction under 28 U.S.C. §1257(3), the petition fails to meet the considerations of Section 1(a) of Rule 19 of this Court.

Furthermore, no conflict exists between the decisions of the highest courts of two or more states concerning the federal question involved here (see, *e.g., United States v. Oregon,* 366 U.S. 643, 645 (1961)); and the holding of the Court of Appeal that federal law has preempted the regulation of aircraft in flight for noise abatement purposes is uncontradicted by the decision of the highest court of any state.

B. The Petition Should Be Denied Because It Seeks Review of an Interlocutory Decision Addressed to an Issue Which Is Not Dispositive of the Case.

Petitioners invoke the certiorari jurisdiction of this Court under 28 U.S.C. §1257(3) which restricts this Court's appellate and certiorari jurisdiction to matters involving "final judgments or decrees". The petition here does not arise from a final judgment or decree at the conclusion of all proceedings before the trial and appellate courts of California. Rather, it is a petition which stems from an interlocutory decision in the underlying litigation.

As previously stated, the Port District demurred generally to the tort counts of petitioners' complaints, and the Superior Court overruled the demurrers. An order overruling a demurrer is not appealable in California. *Harmon v. De Turk* (1917) 176 Cal. 758, 761. The Port District sought relief by way of a writ proceeding in the California District Court of Appeal, and the court refused to issue its writ. While the court held that the regulation of aircraft *in flight* for noise abatement purposes was federally preempted, it allowed the Superior Court to adjudicate the liability of the Port District, if any, for tortious conduct in respect of the management and utilization of ground facilities at Lindbergh Field.

In so doing, the intermediate appellate court issued evidentiary guidelines to the Superior Court for application at trial (67 Cal.App.3d at 377-378) and instructed the trial court that recovery for tort damages at trial "should be limited to those damages, if any, which arise out of the operation of the airport itself". *Id.* at 378. Furthermore, the court recognized that petitioners would seek recovery from the Port District in inverse condemnation. *Id.* at 377.

There are a number of federal issues which require further adjudication by the trial court, and which may require this Court's review at a later date, including:

1. A resolution of petitioners' Fifth and Fourteenth Amendment inverse condemnation claims;

2. The trial court's interpretation and application of the instructions of the Court of Appeal to the particular facts of the underlying actions;

3. The adjudication of petitioners' "grant agreement" counts, which are not involved in this petition, and which rest upon provisions of the Airport and Airway Development Act of 1970 (and associated federal regulations); and

4. The Port District has preserved (and will prosecute an appeal from an adverse inverse condemnation judgment) the right to ask this Court to reconsider its opinion in *Griggs v. Allegheny County, supra*;[14/]

Denial of the Petition for Writ of Certiorari will not preclude petitioners from raising the question they pose here when the parties return to this Court after a full trial on the merits. What petitioners really seek from this Court is its advice concerning the instructions

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14/ See, *e.g.*, Note, *Shifting Aircraft Noise Liability to the Federal Government*, 61 Va.L.Rev. 1299 (1975).

of a California Court of Appeal at an interlocutory stage of litigation still pending in the California Superior Court. This Court does not issue advisory opinions. *Flast v. Cohen*, 392 U.S. 83, 96-97 (1968).

Only rarely has this Court exercised its jurisdiction under 28 U.S.C. §1257(3) in situations involving writs. The relevant policy considerations appear in *Rosenblatt v. American Cyanamid Co.*, 86 S.Ct. 1 (1965). There, the prerequisites to a final judgment or decree were held, *inter alia*, to be "a final assertion of jurisdiction, with no further review of that issue possible in the state courts" and "a state judgment on an issue anterior to and separable from the merits, and not enmeshed in the factual controversies of the case." *Id.* at 3.

Both of these considerations appear in *Fisher v. District Court*, 424 U.S. 382 (1976). There, the Montana Supreme Court had held that the Montana trial court possessed jurisdiction over an adoption proceeding in contravention of the Northern Cheyenne Indian Tribe assertion to exclusive jurisdiction. *Id.* at 385. In *Madruga v. Superior Court*, 346 U.S. 556 (1954), the California Supreme Court had determined that a California trial court possessed admiralty jurisdiction, again with no further review possible in the state courts. *Id.* at 557. This Court held that both *Fisher* and *Madruga* were final for purposes of its review. In each case, the issue was whether the forum court had jurisdiction. In each case, the highest court of each state determined that state court jurisdiction existed, and further review of that issue was not possible in the state courts. Further review of the federal issues in this case, as well as application by the trial court of the instructions in the opinion of the Court of Appeal is not only possible, it is virtually inevitable.

Finally, in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), the Court declared: "Eminent domain proceedings are of the type that may involve an interlocutory decision as to a federal question with another federal question to be decided later." 420 U.S. at 477 n.6. The Court also reiterated the fundamental rule that where anything further remained to be determined by a state court, no matter how dissociated from the only federal issue that had been finally

adjudicated, the final judgment rule would preclude review except where "additional proceedings would not require the decision of other federal questions that might also require review by the Court at a later date". *Id.* at 477.

CONCLUSION

> "'Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls.'"
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> *City of Burbank v. Lockheed Air Terminal, Inc., supra,* 411 U.S. at 633-634 (quoting *Northwest Airlines, Inc. v. Minnesota,* 332 U.S. 292, 303 (1944) (Jackson, J., concurring)).

The California District Court of Appeal correctly concluded that this pervasive, fundamental and exclusive federal control of aircraft in flight prevents petitioners from placing regulation of aircraft operations for noise abatement purposes under the control of local courts; and the Petition for Writ of Certiorari should be denied.

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